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PAGET'S LAW OF BANKING

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PAGET'S LAW OF BANKING

FIFTH EDITION

BY

MAURICE MEGRAH

OF GRAY'S INN, BARRISTER-AT-LAW
SECRETARY TO THE INSTITUTE OF BANKERS

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PREFACE TO FIFTH EDITION

SIR JOHN PAGET died in August, 1938, his memory clear and his mind acute, in spite of his advanced age. This edition, which enlarges the previous one so as to include fresh interpretation and statute law since 1930, had then been in preparation for nearly two years and, subject to the limitations of the editor, has continued the author's characteristic treatment.

The editor deeply regrets that the benefit which he derived from the experience and scholarship of his tutor was suddenly cut off. He accepts full responsibility for any errors which may emerge.

He owes much to C. T., without whose inspiration the work could never have been undertaken by him.

M. M.

11 BIRCHIN LANE, E.C.3,
January, 1947

PREFACE TO FOURTH EDITION

It is increasingly difficult to write of banking law as a distinct subject. The activities of banks are now so various and on such a scale that many questions arise involving general rather than banking law. The recent flood of amending and codifying legislation has complicated the situation.

The position of the bank itself as a company, the status of the people with whom it is doing business, the nature of the transaction, the security offered, any one of these may necessitate reference to the portentous Companies Act, 1929, or the bewildering series of Acts governing dealings with land, although it is only in a few stray sections that these enactments specifically mention bankers.

To treat of all these matters would be foreign to the original scheme of this book, and an encyclopaedic task which the author is neither willing nor competent to undertake. Reference to general law has therefore only been made where such reference is relevant to banking law proper and necessary to bring the original work up to date.

J. R. P.

TEMPLE,
February, 1930

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THE LAW OF BANKING

CHAPTER 1

THE BANKER

THE Bills of Exchange Act, 1882 (*a*), never speaks of a 'bank'; the term employed is always 'banker'. 'Banker' is the operative word in s. 19 of the Stamp Act, 1853 (*b*), and s. 17 of the Revenue Act, 1883 (*c*), under which documents not strictly cheques are brought, in the one case within s. 60, and in the other case within the crossed cheques sections, of the Bills of Exchange Act.

A cheque is a bill of exchange drawn on a 'banker' payable on demand. Where payment is made on forged indorsement, and crossed cheques are collected or paid, protection is strictly confined to cases where one or both parties to the transaction is or are a 'banker' or 'bankers'. Section 74 of the Bills of Exchange Act (*d*) refers to the usage of bankers; the custom of bankers, recognised in law, can only be formed and proved by legitimate bankers. The question "What is a banker?" has been often discussed, and has arisen in practical form on more than one occasion, as by presentment of a crossed cheque otherwise than through a clearing bank by a person or undertaking not obviously fulfilling the accepted status of a banker.

Definitions have been incidentally attempted by the legislature in statutes such as the Money-lenders Act, 1911 (*dd*), the Agricultural Credits Act, 1928 (*e*), the Finance (No. 2) Act, 1915 (*ee*), and the Bank of England Act, 1946 (*f*). These Acts afford no reliable guidance, even if available, for the interpretation of another statute. Take, for example, the terms used in s. 30 (now repealed) of the Finance (No. 2) Act, 1915: "Any bank carrying on a *bona fide* banking business in the United Kingdom", justly stigmatised by an eminent banking authority thus: "This cannot be called a definition, it is more like a helpless appeal for a definition". The Money-lenders Act, 1927 (*ff*) repealed the Act of 1911, but re-enacted (*g*) the

(*a*) 2 Halsbury's Statutes 35.

(*c*) 16 Halsbury's Statutes 547.

(*dd*) 1 & 2 Geo. 5, c. 38.

(*ee*) 16 Halsbury's Statutes 784.

(*ff*) 12 Halsbury's Statutes 224.

(*b*) 1 Halsbury's Statutes 543.

(*d*) 2 Halsbury's Statutes 73.

(*e*) 1 Halsbury's Statutes 170.

(*f*) 9 & 10 Geo. 6, c. 27.

(*g*) s. 2 (3); 12 Halsbury's Statutes 226.

requirement that a certificate granted to a moneylender "shall not authorise a moneylender to carry on business . . . under any name which includes the word 'bank', or otherwise implies that he carries on banking business. . . ." The Agricultural Credits Act, 1928, defines 'bank' as any firm, incorporated company or society carrying on banking business and approved by the Minister of Agriculture and Fisheries. The Bank of England Act, 1946, s. 4 (6), provides that "'banker' means any such person carrying on a banking undertaking as may be declared by order of the Treasury to be a banker for the purposes of this section", the section (s. 4) enabling the newly-acquired central bank to request information from, and make recommendations to, the commercial banks.

Mr. Justice EVE, in *Saunders v. Carboneau* (h), is reported to have expressed the view that the time had arrived when the legislature might well impose some restriction on the indiscriminate use of the term 'bank' by individuals and corporations whose business had no relation to banking, properly so-called. A bill was inaugurated by the government in 1921 with a view to the solution of the problem, but it never became law.

The Bills of Exchange Act, 1882 (i), itself gives no help. Its only reference to the matter is in s. 2: "'Banker' includes a body of persons, whether incorporated or not, who carry on the business of banking", a pronouncement which has been the subject of much sarcasm and is usually read as the mere equivalent of the more familiar form "The singular includes the plural". A similar definition is given by the Stamp Act, 1891, s. 29 (j).

The question presents itself in two aspects. First, as to the desirability of protecting the public from being induced by the ostentatious adoption of the name 'bank' to entrust their money to dubious concerns. There have been flagrant examples of this exploitation of the term with considerable success, though, probably, it is no longer, if it ever was, an evil calling for remedy, but it does not fall within the purview of the present work. Indeed, the interests of the community at large and the banks seem somewhat opposed in this connection. The Report, dated June 1945, of the Company Law Amendment Committee, presided over by Mr Justice COHEN, recommends that section 17 (1) of the Companies Act, 1929 (k) be replaced by a section giving the Board of Trade discretion to refuse a name wherever they consider that the name is calculated to mislead the public. It is not obvious, however, how far this will meet the objection.

Every suggestion of legislation in the public interest appears

(h) (1910), *Times*, March 23; "Journal of Institute of Bankers", vol. xxxi, p. 265.

(i) 2 Halsbury's Statutes 35.

(k) 2 Halsbury's Statutes 784.

(j) 16 Halsbury's Statutes 626.

to involve the use of the term *bona fide*. It might be difficult to set up one definition of a bank or banker for general use, and another as an interpretation section to the Bills of Exchange Act; but any importation or idea of *bona fides* with regard to the latter would be simply fatal. As things stand, the bank clerk to whom a crossed cheque is presented over the counter by a professing banker has a complicated question of law and one of fact, on which he has no evidence, to decide. He must at once either pay or dishonour. If he does the first, he may lose all protection and perhaps have to pay twice; if the second, he may be liable to his customer for damages for injury to credit. In electing which to do, he or the bank manager must make up his mind: (1) What is a banker? (2) Is the presenting party a banker?

Similarly, when a crossed cheque is paid in by a customer, the collecting banker is not protected unless the drawee is really a banker.

To complicate this situation by introducing the element of *bona fides* would involve the making of another vital decision by the bank official in the case of every crossed cheque presented for payment otherwise than by someone unquestionably a 'banker'. Not only would he have to determine on the spur of the moment whether the party presenting was, in law and fact, a 'banker', but he would be faced by the moral and well-nigh insoluble problem whether he was a *bona fide* 'banker'. And his position would be the same if a crossed cheque drawn on a concern not definitely recognised as a bank were paid in for collection by a customer.

In fact, the real banker is in no way concerned with the *bona fides* of the professing banker. If the latter fulfils the necessary qualifications and characteristics of a 'banker', he may be an impecunious and fraudulent person or combination of such characters, but all the same he is a 'banker'. On the other hand, if he does not fulfil those qualifications and characteristics, he is not a 'banker', albeit he may pursue with integrity and ample resources an analogous and honourable calling.

The only true road to safety, both for the public and the banker, seems to lie in the scheme, propounded by those best qualified to judge, of an authoritative and conclusive register of bankers, analogous to the Medical Register, the Army List, or the Navy List. The Bankers Almanac, though approaching this objective, is not authoritative in this sense. Such a register, compiled after due investigation by a legally qualified tribunal and amended by it as occasion might require, would supply a means of ready reference and prompt decision, open to the bank clerk and public alike. But today such a register is hardly needed, not that uncertainty does not still emerge occasionally, but that it is easily disposed of, for a newcomer into the category of 'banks' is rare, is soon known

and accepted or rejected for the purposes for which he claims to be a bank.

Pending relief of this sort, the banker has to take the responsibility of dealing or declining to deal with those who may or may not be 'bankers'. It is well that in fact difficulty rarely arises, for the guidance to be derived from such legal decisions as exist is not by any means clear or conclusive.

The test suggested by CHRISTIAN, L.J., in *Davies v. Kennedy (l)*, strikes one as being a fair one :

"Was the business carried on what the ordinary intelligent commercial man would call the trade or business of a banker?"

The judgment was a dissentient one, but it does not seem impugned by the other judgments in the case or those of the House of Lords in the same case, *sub nom. Copland v. Davies (m)*. There LORD HATHERLEY, C., says, at p. 375 :

"With regard to Mr. Kennedy, it is not disputed that he was a banker in the ordinary sense of the word, as receiving people's moneys and giving them receipts, receipts not as for transfers of property or anything of that kind, but receipts acknowledging the receipt of money, and issuing pass books and cheque books, and dealing with them in the ordinary way of a banker, that in every other sense he was a banker, but not in the sense of issuing notes for circulation."

The question there was whether the Act 33 Geo. II. c. 14 (n), was confined to banks of issue ; the last few words of this sentence have therefore no application here.

In *Re Shields' Estate (o)* FITZGIBBON, L.J., says, at p. 198 :

"If a banker's business was confined to honouring cheques on demand he could not make any profit at all, those who take money 'on deposit' are just as much bankers as those who hold it on 'current account'."

It is difficult to see the ground for the suggestion that a good current account, on which no interest is paid, is not as remunerative as a deposit account on which interest is paid ; and the *dictum* that the acceptance of money on either deposit account or current account by itself constitutes the recipient a banker is not in accord with other decisions. Indeed, in the same case, LORD ASHBOURNE points out that at the passing of the statute in question, 33 Geo. II. c. 14, cheques were in very rare use, and that it might in 1901 be plausibly argued that the honouring of customers' cheques was an essential part of banking. In fact he well-nigh admits, at pp. 191 and 195, that it is so.

In *Re District Savings Bank, Ltd., Ex parte Coe (p)* TURNER, L.J., said :

(l) (1868), 17 W.R. 305 ; 3 Digest 134, 93 l.

(m) (1872), L.R. 5 H.L. 358 ; 42 Digest 663, 728.

(n) Act for Enlarging Times for First Meeting of Commissioners, etc., 1759.

(o) [1901] 1 I.R. 172.

(p) (1861), 3 De G.F. & J. 335 ; 3 Digest 134, 97.

"Even that branch of the company's business which has most resemblance to banking differs materially from the ordinary business of bankers, for the company did not honour cheques payable on demand and drawn upon themselves."

In *Re Bottomgate Industrial Co-operative Society* (pp) SMITH, J., said :

"It is not necessary . . . in order to constitute a banking business prohibited by the Statute (Industrial and Provident Societies Act, 1862) that the Society should carry on every part of a business carried on by some bankers ; it is sufficient to bring the business within the prohibition, if the Society carried on what is a principal part of the business of a banker, viz., receiving money on deposit, allowing the same to be drawn against as and when the depositor desires, and paying interest on the amounts standing on deposit."

In *Re Birkbeck Permanent Benefit Building Society*, in the Court of Appeal (q), BUCKLEY, L.J., said :

"It opened current accounts and deposit accounts, and in every essential particular, nay more, I think I may say in every particular, it did that which a banker does in the course of a banking business, and offered its customers all such facilities as a bank commonly offers."

Some of the older *dicta* seem to give undue prominence to the deposit side of banking. In view of the provisions of the Bills of Exchange Act, and the later affirmation of cheque business as the leading feature of a bank concern, the scale would appear to have turned.

Again, looking at the crossed cheques sections of the Bills of Exchange Act, the consequent restriction on the encashment of crossed cheques save through a banker, and the universal and legally encouraged use of crossed cheques, the collection of such cheques must be regarded as an inherent part of a banker's business. It is therefore a fair deduction that no one and no body, corporate or otherwise, can be a 'banker' who does not

1. take deposit accounts ;
2. take current accounts ;
3. issue and pay cheques drawn on himself ;
4. collect cheques for his customers.

One or two minor and somewhat obvious tests have been laid down :

Banking must be part of the man's known occupation (r).

He must hold himself out as a banker and the public take him as such (s).

There must be an intention generally to get a living by so doing (t).

Next arises the question whether an individual, a partnership, or a company can be a 'banker' who or which com-

(pp) (1891), 65 L.T. 712, at p. 714. (q) [1912] 2 Ch. 183, C.A.

(r) *Adams v. Malkin* (1814), 3 Camp. 534 ; 4 Digest 24, 177.

(s) *Stafford v. Henry* (1850), 12 I. Eq. R. 400.

(t) *Re Bryant, Ex parte Paterson* (1813), 1 Rose, 402 ; 4 Digest 17, 75.

bines banking business with one or more other enterprises or undertakings. If the banking business is subsidiary to another business or other businesses carried on by the same concern, that concern is not 'a banker'. "If those acts did not form a substantial part of his business he was not a banker" (u).

Referring to this case, FITZGIBBON, L.J., says, in *Re Shields' Estate, ubi supra*, at p. 199 :

"Such a case as that of Labertouche is easily understood. He carried on several classes of business, stock-broking, agency, and money-broking, including some banking business. It was held that banking was not his chief business, but was only ancillary to it, and therefore he was not a banker."

In the same case LORD ASHBOURNE says, at p. 197 :

"If a man carries on other businesses besides that of banking, and if the banking is only subsidiary to the other businesses, he cannot be regarded as a banker."

Finally, there is the general principle enunciated by the Court in *Halifax Union v. Wheelwright (v)*, that the statutory privileges and immunities accorded to bankers are based on and justified by the recognised high standing and probity of the profession, a doctrine not necessarily applicable to a concern which combines banking with other business.

Where only two businesses are carried on, one banking, the other not, of equal importance, so that neither can fairly be said to be subsidiary or ancillary to the other, there is some doubt.

In the old case of *Richardson v. Bradshaw (w)*, although a man kept twenty-six regimental accounts, his status as a banker appears to have been doubted on the ground of his having another occupation, and an issue was directed.

In *Furber v. Fieldings, Ltd. (y)*, where a similar question was incidentally raised on the wording of the Money-lenders Act, 1900, s. 6 (z), exception (a), PHILLIMORE, J., declined to decide it.

In *Edgelow v. MacElwee (a)*, MCCARDIE, J., said :

"A man may follow concurrent callings. If one of such callings be the trade of a moneylender, then the Act must be complied with";

but he held that the man's other vocation was a mere disguise.

The direct authorities lay stress upon the subsidiary character of the banking business, and, bearing in mind concerns which have combined banking with one other business in pretty equal parts, but which were yet universally recognised as banks, it would probably be going too far to exclude such undertakings, if any exist, from the category of bankers.

(u) *Stafford v. Henry* (1850), 12 I. Eq. R. 400.
 (v) (1875), L.R. 10 Exch. 183 ; 3 Digest 172, 295.
 (w) (1752), 1 Atk. 128 ; 4 Digest 19, 111.
 (y) (1907), 23 T.L.R. 362 ; 35 Digest 203, 288.
 (z) 12 Halsbury's Statutes 222.
 (a) [1918] 1 K.B. 205 ; 35 Digest 203, 290.

There is little doubt where the administration of the banking side of a business has been handed over to a separate company, as is the case in Lewis's Bank Limited, for example; though where such business is handled by a separate department, merging its figures with those of the general business, as in the case of Harrods, or even keeping separate accounts, the position again approaches the borderline.

The making of a return under s. 21 of the Bank Charter Act, 1844 (b), or s. 108 of the Companies Act, 1929 (c), does not constitute a firm a bank which is not so in itself. Section 361 of the Companies Act, 1929 (d), enacts that where a company carrying on the business of banking has made a return under s. 108 and added thereto a statement of the names of the places where it carries on business it "shall be deemed a bank and bankers within the meaning of the Bankers' Books Evidence Act, 1879" (e). This definitely excludes any larger or general inference.

Nor is it possible that a company can effectively arrogate to itself a specific legal character and exclusive attributes and privileges by including the business of banking, with other functions, in its memorandum and articles of association, or by obtaining a certificate of registration, conclusive as the latter may be for many purposes.

There remains the consideration whether the words quoted from s. 2 of the Bills of Exchange Act (f) can be read as enlarging the legitimate meaning of 'banker'. The section is purely and avowedly an interpretation one; in its various clauses it uses with discrimination the words 'means' and 'includes'. Here it says 'includes'. Its primary object is obviously not only to ensure that the singular shall include the plural, but also to embrace, as well as partnerships of individual bankers, banking corporations or companies incorporated by Act of Parliament, charter, or under the Companies Acts. 'Includes' does not denote extension to the included subjects of attributes not pertaining to that wherein they are included. Rather is the contrary the case. Things included, even in the most general terms, are subject to restrictions incidental to that wherein they are included (cf. *Maxwell on the Interpretation of Statutes*, 8th (1937) ed., and cases there cited). The opposite construction would seem to involve the queer result that an individual who was not strictly a banker would not be within the Act, while if he took to himself a partner or partners of precisely similar character, the firm would be.

In the Crossed Cheques Act, 1876 (g), the wording was :

" 'Banker' includes persons or a corporation or company acting as bankers."

(b) 1 Halsbury's Statutes 537.

(c) 2 Halsbury's Statutes 841.

(d) 2 Halsbury's Statutes 1000.

(e) 8 Halsbury's Statutes 236.

(f) 2 Halsbury's Statutes 35.

(g) 39 & 40 Vict. c. 81 (repealed by the Bills of Exchange Act, 1882).

The words used in s. 2 of the Bills of Exchange Act, "who carry on the business of banking", seem to import a narrower meaning. It would be an unwarranted paraphrase to read this as "the business of banking among other businesses".

The above authorities and arguments seem fairly conclusive. Wherever, therefore, in the following pages, a banker is referred to in any proposition put forward by the author, the word is to be taken in the sense above attributed to it.

CHAPTER 2

THE CUSTOMER

SUMMARY—

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SECTION 1.—WHAT CONSTITUTES A CUSTOMER

No less important is the question correlative to the one dealt with in the previous chapter, namely, "Who is a customer?" The relation of banker and customer is the foundation of the whole doctrine of mandant and mandatory in this connection, a doctrine of vital concern to both parties in view of the mutual duties, liabilities, and privileges it involves, a doctrine now happily rescued from long and undeserved obloquy and disregard by the judgment of the House of Lords in *London Joint Stock Bank, Ltd. v. Macmillan and Arthur (a)*.

Having regard to the decisions of the House of Lords in *Capital and Counties Bank, Ltd. v. Gordon, London City and Midland Bank, Ltd. v. Gordon (b)*, and of BAILHACHE, J., in *Ross v. London County Westminster and Parr's Bank, Ltd. (c)*, with respect to bankers' drafts, hereinafter dealt with, it is conceivable that a cheque is not necessarily drawn by a customer, strange as the proposition may appear. Anyway, it is difficult to see how such a document could be paid "in the ordinary course of business" within s. 60 of the Bills of Exchange Act, 1882 (*d*), unless drawn by a customer.

In the collection of cheques, a function fraught with many dangers to the banker, his sole protection is when they are crossed and he receives payment of them, as rigidly prescribed by s. 82 of the same Act (*e*), "for a customer".

So again, the banker's lien is dependent upon the relative position of the parties being that of banker and customer.

(a) [1918] A.C. 777 ; 3 Digest 76, 159.

(b) [1903] A.C. 240 ; 6 Digest 35, 241.

(c) [1919] 1 K.B. 678 ; 6 Digest 35, 242.

(d) 2 Halsbury's Statutes 66.

(e) *Ibid.*, 76.

The Bills of Exchange Act makes no attempt to define a customer.

The decisions on the point are conflicting to a bewildering degree.

The original view was that, to constitute a 'customer' there must be some recognisable course or habit of dealing in the nature of regular banking business; that an isolated transaction of that nature or a series of transactions not commonly associated with banking is not sufficient.

That the element of use and habit was thought to be involved is distinctly shown by *Mathews v. Brown & Co.* (f), and *Great Western Railway Co. v. London and County Banking Co., Ltd.* (g). In *Lacave & Co. v. Crédit Lyonnais* (h), COLLINS, J., said :

"I cannot see any dividing line between a person who has an [*sic*, but the word must be 'no'] account and anyone who chooses to come with a cheque and ask the bank to collect it for him."

And he refers to *Mathews v. Brown & Co.* as

"a decision which undoubtedly decided that no one but a customer in the proper sense of the word, a person having an account at the bank, would be entitled to the benefit of the section (s. 82)."

Of course it is the banker, not the customer, who really benefits by s. 82, but that does not affect the question.

A deposit account qualifies a man as a customer apart from any current account (j).

That persistence in a course of dealing not distinctly related to banking business is not sufficient is shown by *Great Western Railway Co. v. London and County Banking Co., Ltd.*, *ubi supra*, where a man had been for some years in the habit of getting crossed cheques exchanged for cash at a bank where he had no account, and which charged him nothing for the accommodation. It was held by the House of Lords, reversing the judgment of the Court of Appeal, that he was not a customer.

It has been thought difficult to reconcile the idea of a single transaction with that of a customer; that the word predicates, even grammatically, some minimum of custom, antithetic to an isolated act. This view is still held, but it has generally been overthrown in favour of the view which regards 'duration' as not of the essence (k); and an intention, other things being equal, to enter upon a course of dealing as probably sufficient to establish the relationship of banker and customer.

In *Tate v. Wilts and Dorset Bank* (l), DARLING, J., said

(f) (1894), 63 L.J.Q.B. 494; 3 Digest 239, 671.

(g) [1901] A.C. 414; 3 Digest 172, 292.

(h) [1897] 1 Q.B. 148, at p. 154; 3 Digest 239, 672.

(j) *Per* LORD DAVEY, *Great Western Railway Co. v. London and County Banking Co., Ltd.*, [1901] A.C., at p. 421; 3 Digest 172, 292.

(k) See *Commissioners of Taxation v. English, Scottish and Australian Bank*, [1920] A.C. 683; Digest Supp.

(l) (1899) "Journal of Institute of Bankers", vol. xx, p. 376; 3 Digest 240, 679.

of a man paying the first cheque into an account which continued for nearly two months afterwards :

“ He was not a customer at the moment, but he was going to become a customer if that cheque was collected.”

Nevertheless, in *Commissioners of Taxation v. English, Scottish and Australian Bank*, *ubi supra*, decided by the Judicial Committee of the Privy Council in 1920 on a Colonial enactment corresponding *verbatim* with s. 82 (*m*), a man was held a ‘ customer ’ whose only connection with the bank at the material date was the payment in of a single cheque for collection ; a typical case of a first transaction. The material portion of the judgment is as follows (p. 687) :

“ Their Lordships are of opinion that the word ‘ customer ’ signifies a relationship in which duration is not of the essence. A person whose money has been accepted by the bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in the view of their Lordships, a customer of the bank in the sense of the statute, irrespective of whether his connection is of short or long standing. The contrast is not between an habitué and a new-comer, but between a person for whom the bank performs a casual service, such as, for instance, cashing a cheque for a person introduced by one of their customers, and a person who has an account of his own at the bank.”

The same line was taken by BAILHACHE, J., in *Ladbroke & Co. v. Todd* (*n*). There the man was told by the bank that he could not draw against the cheque until cleared, but the Judge said that it was not necessary that “ he should have drawn any money or even that he should be in a position to draw money ”.

In this diversity of opinion, the matter appears to be still open to further discussion and final decision. That decision would most likely be found to lie close to the view expressed in the *Commissioners of Taxation Case*, taking the line that this is not really a legal question but one to be solved by what an ordinary intelligent business man would understand by ‘ a bank’s customer ’.

Considering the matter from another point of view, LAWRENCE, L.J., in *Savory (E. B.) & Co. v. Lloyds Bank, Ltd.* (*o*)—a case of the collection of cheques by means of the branch credit system—doubted whether the parties for whose accounts the cheques in that case were collected were customers of the bank within the meaning of s. 82, inasmuch as their accounts were at branches of the bank other than those which actually took in the cheques. He referred to the decision in *Prince v. Oriental Bank Corporation* (*p*), in which Sir Montague Smith pointed out that it would be difficult for a bank to carry on its business by means of branches on any other footing than

(*m*) 2 Halsbury’s Statutes, 76.

(*n*) (1914), 19 Com. Cases 256 ; 3 Digest 239, 674.

(*o*) [1932] 2 K.B. 122.

(*p*) (1878), 3 App. Cas. 325 ; 3 Digest 173, 301.

that the obligation of the bank was to pay at the branch where the account was kept, because the officials of one branch do not know the state of a man's account at another branch ; and said : " If the respondent [Lloyds] bank was right (as I think it clearly was) in stating . . . that what goes into an account calls for as much scrutiny as that which goes out, the reason in the above passage (*Prince v. Oriental Bank Corporation*) (*pp*) . . . seems to me to afford a *prima facie* ground for the contention that they [branches] ought to be similarly treated in the matter of collecting cheques ". He then referred to *Lacave & Co. v. Cr dit Lyonnais* (*q*), *Great Western Railway Co. v. London and County Banking Co., Ltd.* (*r*), and *Commissioners of Taxation v. English, Scottish and Australian Bank* (*s*) in this connection, and, deciding against the bank on other grounds, made it clear that on this point he was not deciding in favour of the bank. It is unlikely that such a view of the meaning of customer would find general acceptance. Why a person who possessed all the recognised attributes of a customer should be placed outside the category merely because he used for the collection of his cheques a system designed by the banks to facilitate such collection for customers, is hard to see, particularly in view of the effect of the House of Lords' decision in the same case, that in order to bring themselves within the protection of s. 82 (*t*), as having collected without negligence, the banks are compelled to ensure that there is proper liaison between the branch which actually receives the credit and the branch where the account is kept.

A bank is not a purely philanthropic institution. It is true that banks perform gratuitously for their customers many useful functions for which those customers would otherwise have to pay elsewhere. But it is the business relation, the facilities for depositing moneys, the convenience of the cheque book on the one hand and the beneficial use of the money deposited on the other hand, which is at the root of the conception of a customer. This was recognised in *Great Western Railway Co. v. London and County Banking Co., Ltd.* (*u*), though LORD BRAMPTON was inclined to hold any pecuniary interest immaterial. If a man obtained from a bank an agreed overdraft, never paying in, but giving good security and paying interest and drawing cheques on the account, he would presumably become a customer ; similarly, possibly, a continued practice of getting bills discounted by a bank. An English bank, acting as agent for a foreign bank, habitually collected cheques drawn on other English banks and paid into the foreign bank by that bank's customers. The English bank, so collecting a crossed cheque, was held by the Court of Appeal to be a customer of the drawee bank within s. 82 and the drawee bank not to have been

(*pp*) (1878), 3 App. Cas. 325 ; 3 Digest 173, 301.

(*q*) [1897] 1 Q.B. 148 ; 3 Digest 239, 672.

(*r*) [1901] A.C. 414 ; 3 Digest 172, 292.

(*s*) 2 Halsbury's Statutes 76.

(*t*) [1920] A.C. 683 ; Digest Supp.

(*u*) [1901] A.C. 414 ; 3 Digest 172, 292.

negligent, although the cheque was marked 'account payee only' (*Importers Co. v. Westminster Bank* (w)). In that case, ATKIN, L.J., said, at p. 310: "... it seems to me that if a non-clearing bank regularly employs a clearing bank to clear its cheques, the non-clearing bank is the 'customer' of the clearing bank".

If a man is not otherwise a customer, such expedients as making him draw a counter cheque for the amount, or entering the transaction under some such heading as 'sundry customers', will be of no avail (y).

A man is none the less a customer because he is overdrawn (*Clarke v. London and County Banking Co.* (z)).

SECTION 2.—SPECIAL CUSTOMERS

A. IMPERSONAL CUSTOMERS

Attempts have sometimes been made to foist off on bankers a sort of impersonal customer to whom the banker is supposed to look for payment of overdrafts.

The committee or board of management of a fund raised to meet some national or local emergency, of a charitable or scientific institution or a proposed exhibition, open an account, and cheques are drawn on it by authorised members of the committee or board, usually countersigned by the secretary. In the case of a mere fund there can be, and in the other cases there may be, no corporate body or legal entity; the committee or board are only administering certain moneys coming to their hands. There is no particular danger so long as the account continues in credit. But such accounts have a tendency to become overdrawn, and it then behoves the banker to see that he obtains and retains the personal liability of those who draw the cheques, and that they are persons of financial responsibility. If the account be opened and headed in the name of the fund or undertaking, if the cheques bear its name, and if the signatures purport to be on its behalf, or in a form indicating that the signatories act as mere scribes, it might be alleged with some plausibility that the banker honoured the cheques and advanced the money in reliance on and looking to the moneys accruing to the undertaking or institution, and not on the personal responsibility of the drawers. The doctrine of *Kelner v. Baxter* (a), that a person who contracts on behalf of a non-existent principal is himself liable, or of *West London Commercial Bank, Ltd. v. Kitson* (b), that a procuration signature imports a warranty of an

(w) [1927] 2 K.B. 297; Digest Supp.

(y) Cf. *Mathews v. Brown & Co.* (1894), 63 L.J.Q.B. 494; 3 Digest 239, 671; *Great Western Railway Co. v. London and County Banking Co., Ltd.*, [1901] A.C. 414, at p. 425; 3 Digest 172, 292.

(z) [1897] 1 Q.B. 552; 3 Digest 240, 675.

(a) (1866), L.R. 2 C.P. 174; 12 Digest 23, 25.

(b) (1884), 13 Q.B.D. 360; 1 Digest 664, 2787.

existing principal and authority from him to sign, would be of doubtful application in such a case, and it is far better to avoid all questions by a definite understanding at the outset. Institutions such as those above referred to sometimes become incorporated, either by royal charter, or else under the Companies Acts, omitting the word 'limited' by leave of the Board of Trade. Opportunity may be taken of this to assert a transference of liability from the individuals to the new corporation by way of novation, as was attempted in *Coutts & Co. v. Irish Exhibition in London* (c). The banker may, if he chooses, accept such a corporation as his debtor for past or future advances, or as his customer in the first instance; in any case he should bear in mind that members of a corporation cannot be personally sued for its debts, that their liability arises only on a winding-up and is then limited by the terms of the incorporating instrument, that a royal charter rarely imposes any liability whatever on members, and that the Board of Trade minimum for the liability of members of a non-trading society (e.g., one limited by guarantee) is practically a nominal figure.

B. NON-TRADING CORPORATIONS

Sir Mackenzie Chalmers raised the question whether a non-trading corporation could in the absence of authority expressed in, or directly deducible from, its incorporating instrument, issue valid cheques (d). He inclined to the view that it could do so. It can hardly be suggested that a railway or gas company, both of which are technically non-trading, is constrained to pay all its outgoings in bank notes or cash. *Serrel v. Derbyshire, etc. Railway Co.* (e), and *Bateman v. Mid-Wales Railway Co.* (f), seem to recognise a distinction between bills and cheques in this respect.

It is submitted that the power to issue cheques for ordinary payments is impliedly inherent in all corporations.

Overdraft is borrowing, and so stands on a different footing, being dependent on the borrowing powers of the corporation.

C. MARRIED WOMEN

Since the Law Reform (Married Women and Tortfeasors) Act, 1935, there is practically no distinction between the capacities of a married woman and of a *feme sole* or a man.

A married woman can open a current account, and all moneys standing to such account in the married woman's own name are deemed her own estate, so as to entitle her to deal

(c) (1891), 7 T.L.R. 313; 3 Digest 263, 799.

(d) *Bills of Exchange*, 10th (1932) ed., p. 75.

(e) (1850), 9 C.B. 811; 10 Digest 1175, 8336.

(f) (1866), L.R. 1 C.P., at p. 506; 10 Digest 1170, 8307.

with them (g). By the same section, a married woman has power to contract with regard to her property as if she were a *feme sole*, so that she can draw bills and cheques (h). Moreover, the Act voids any instrument executed on or after the 1st January, 1936, in so far as it purports to attach to the enjoyment of any property by a woman any restriction on anticipation or alienation which could not have been attached to the enjoyment of that property by a man. Where such restraint is imposed by an instrument executed on or after the 1st January, 1936, in pursuance of an obligation imposed before that date, the instrument attaching such a restriction shall be deemed to have been executed before that date. But if the restraint is imposed by an instrument executed before that date (or by any statute passed before the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935), it remains in force.

So far as concerns a will of a testator who dies after the 31st December, 1945, the will shall, for purposes of this statute in relation to restraint upon anticipation, be deemed to have been executed after the 1st January, 1936. Thus the effect of this statute is that existing restraints are no longer operative unless they took effect before the 1st January, 1936, or are imposed by the will of a testator dying before the 31st December, 1945, and that any future attempt to attach a restraint will be void. Overdrafts or other obligations incurred by a married woman would be recoverable only against her separate property free from restraint on anticipation.

Change of ownership

There are obvious circumstances which may supervene and affect the property in and right to moneys on current account, whether regarded as actual money or as a debt from the banker. On the death of an individual customer the title vests in his personal representatives, and on production of probate or letters of administration they are entitled to draw upon or otherwise deal with the account (j).

Joint accounts

In ordinary joint accounts, and in the absence of provision to the contrary, all those in whose names the account stands must combine in drawing or authorise one or more of their number to do so (k). On the death of a joint holder the survivor or survivors is or are in ordinary cases entitled to the whole amount, either under the law of devolution between joint owners or by custom of bankers and implied agreement. A distinction must, however, be drawn in the case of joint account

(g) Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1; 28 Halsbury's Statutes 104.

(h) Bills of Exchange Act, 1882, s. 22; 2 Halsbury's Statutes 45.

(j) *Tarn v. Commercial Bank of Sydney* (1884), 12 Q.B.D. 294; 23 Digest 64, 463.

(k) *Husband v. Davis* (1851), 10 C.B. 645, at p. 650; 3 Digest 187, 371; *Marshall v. Crutwell* (1875), L.R. 20 Eq. 328; 27 Digest 164, 1336.

in the names of husband and wife, where there is authority to the wife to draw. Then on death of the husband it becomes a question of intention : whether the method of keeping and working the account was for the sake of convenience or for the purpose of providing for the wife in case she was the survivor. As to the differing conclusions arrived at on this basis, see *Marshal v. Crutwell*, *ubi supra* ; *Williams v. Davies* (1) ; *Hall v. Hall* (m), and other cases cited on p. 97, *post*. If either husband or wife became insane it would not be safe for the bank to part with the money to the other party. This is true in regard to all joint accounts ; the insanity of any party revokes any mandate he may have given.

In *Hirschorn v. Evans* (mm), a mandate in the following form was considered in relation to the attachment, by garnishee process, of a balance on joint current account with a bank : " We request you to receive money from time to time to the credit of this account and hereby authorise you to accept the signature of either [of us] or the signature of the survivors or survivor as a sufficient discharge for the repayment of any moneys so deposited with you ". It was argued that the account was in its nature several as well as joint. SLESSER, L.J., was unable to accept this view. " It seems to me that it amounts to no more than that the bank are under an obligation at any time to meet the demand of either the husband or the wife, and to that extent, when that demand is dishonoured, the bank would be responsible for failure to meet that payment ". According to MACKINNON, L.J., the mandate meant : " ' Either of us has authority on behalf of, and as agent for, both of us to sign cheques '. It would amount to no more than an added authorisation to the bank, ' Upon this our joint account you are authorised to honour cheques drawn by our clerk or agent John Smith ', notwithstanding that it was, and at all times remains, a joint account."

D. MINORS

The accounts of minors have been the subject of considerable discussion and call for special treatment. Arguments against the possibility of opening or keeping a current account with an infant have been based on :

- (1) the alleged incapacity of an infant to give an effective discharge for a debt ; and
 - (2) the alleged incapacity of an infant to draw a valid cheque.
- Such arguments are, it is conceived, based on fallacies. " The disability of infancy goes no further than is necessary for the protection of the infant " (n).

(1) (1864), 3 Sw. & Tr. 437 ; 3 Digest 190, 390.

(m) [1911] 1 Ch. 487 ; 27 Digest 156, 1262.

(mm) [1938] 2 KB. 801 ; [1938] 3 All E.R. 491.

(n) *Per* PEARSON, J., in *Burnaby v. Equitable Reversionary Interest Society* (1885), 28 Ch.D., at p. 424 ; 28 Digest 188, 457.

No doubt an infant cannot give an effective discharge for an unperformed obligation ; he cannot, even by deed, release an unpaid debt. But where the discharge is merely the recognition of the performance of the obligation, such as a receipt, there is no rational ground for importing the disability.

The case usually quoted in support of the proposition that an infant cannot give a valid discharge, *Ledward v. Hassells* (o), possessed exceptional features, turning as it did on the express words of a will, which made the payment of a legacy to an infant conditional on his ability to give a valid discharge, so that, in a sense, such discharge would have had to be given (if at all) for a legacy as yet unpaid.

The capacity of an infant to give a discharge for fulfilled obligations in ordinary cases appears to be recognised by JAMES, L.J., in *Re Brocklebank, Ex parte Brocklebank* (p), where he said : " Cannot an infant give a receipt for wages or any salary due to him in respect of his personal labour ? "

Moreover, it is difficult to see how the question is of practical importance. The only circumstances in which the efficacy of a discharge could be material would be if the infant were trying to recover from the banker money already paid to him or on his cheques ; and such a claim is absolutely untenable.

As to the alleged incapacity of an infant to draw a valid cheque

The Bills of Exchange Act, 1882, s. 22, sub-s. 1 (q), distinctly limits the infant's incapacity to the assumption of liability. Sub-section 2 of the same section enacts that where a bill is drawn or indorsed by an infant the drawing or indorsement entitles the holder to receive payment of the bill and enforce it against any party thereto ; that is, any party other than the infant.

A cheque is a bill of exchange drawn on a banker payable on demand (r). It is difficult, therefore, to see why a cheque drawn by an infant does not possess all the characteristics of a cheque drawn by a person of full age, save in so far as relates to the liability thereon of the drawer.

Another argument against keeping an account with a minor has been formulated as follows. To constitute a cheque or to entitle the banker to the protection of s. 60 (s) in respect of a cheque drawn on him, the relation of banker and customer must exist. That relation has been held to subsist although the banker has, by reason of overdraft, become the creditor instead of the debtor (t). Therefore the complete relation cannot

(o) (1856), 2 K. & J. 370 ; 44 Digest 477, 2958.

(p) (1877), 6 Ch.D. 358 ; 28 Digest 296, 1525.

(q) 2 Halsbury's Statutes 45.

(r) Bills of Exchange Act, 1882, s. 73 ; 2 Halsbury's Statutes 73.

(s) 2 Halsbury's Statutes 66.

(t) *Hardy v. Veasey* (1868), L.R. 3 Exch. 107 ; 3 Digest 304, 985 ; *Clarke v. London and County Banking Co.*, [1897] 1 Q.B. 552 ; 3 Digest 240, 675.

exist where the customer could never be a debtor, and thus a banker paying a cheque drawn on him by an infant is not entitled to the same protection against forged indorsement or under the crossed cheques sections as he would be in the case of an ordinary cheque.

Such an argument would, however, infallibly be rejected by a court as fantastic and far-fetched.

The primary and natural relation of banker and customer, as contemplated in all the leading cases, is that the banker is debtor, the customer creditor. Where these conditions exist, as they perfectly well may in the case of an infant customer, it is irrelevant to import non-existent and supposititious circumstances as having any bearing on the position (*u*).

Moreover, as will be hereafter pointed out under the heading of 'Cheques', the Act does not specifically require that a cheque be drawn by a customer; and the reference that it must be is considerably weakened by the judgment in *London City and Midland Bank, Ltd. v. Gordon* (*w*).

Infant reclaiming money paid

Another suggested danger is that the minor, after drawing out the whole of his current account, might, either before or on attaining majority, claim the money over again from the banker, on the ground of his own inability to give a valid discharge during infancy. Persons advancing this view have adduced in support the special provisions of Savings Banks and other Acts, constituting an infant's receipt a discharge for his deposit.

This suggested danger is purely imaginary. Whatever may be the law where it is sought to enforce a contract against an infant or make him pay for goods purchased or repay money lent, when the positions are reversed and the infant is himself the moving party, the ordinary rules of justice and equity prevail.

"If an infant was to buy a thing, not being necessities, he could not be compelled to pay for it, but having done so, he could not recover back the money" (*y*). "If an infant receives rents, he cannot demand them again when of age" (*z*). *Valentini v. Canali* (*a*) is an authority to the same effect. It was followed in *Pearce v. Brain* (*b*), though with some hesitation. The whole law as to infants' contracts and liabilities is exhaust-

(*u*) Cf. *Nottingham Permanent Benefit Building Society v. Thurston*, [1903] A.C. 6; 32 Digest 294, 696, where it was said an infant might well be a member of a building society though incapacitated from borrowing like the adult members.

(*w*) [1903] A.C. 240; 3 Digest 240, 676.

(*y*) Per LORD KENYON, in *Wilson v. Kears* (1800), Peake, Add. Cas. 196; 28 Digest 163, 203.

(*z*) Per LORD MANSFIELD, in *Buckinghamshire (Earl) v. Drury* (1762), 2 Eden, 60; 28 Digest 176, 367.

(*a*) (1889), 24 Q.B.D. 166; 28 Digest 164, 207.

(*b*) [1929] 2 K.B. 310; Digest Supp.; and cf. *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589; 9 Digest 276, 1699.

ively reviewed by the Court of Appeal in *Leslie (R.), Ltd. v. Sheill (c)*, where it was held that money lent to an infant could not be recovered from him although the loan was obtained by his false representation that he was of full age.

The cases of *Hedgley v. Holt (d)* and *Rawley v. Rawley (e)*, which at first sight might seem to justify the opposite view, are, as shown by the latter, explainable by the fact that they were cases of set-off, that the obligation set up against the infant was prior to and wholly independent of the obligation sought to be enforced by him, and that the technical rule requiring a set-off to be a recoverable debt precluded the court from entertaining as such the claim set up against the infant.

As to money paid on the cheques of the infant, there are in addition the provisions of s. 22, sub-s. 2, of the Bills of Exchange Act, before referred to : they expressly affirm the right of the holder of a bill drawn by an infant to receive the money for it. This absolutely involves the discharge of the drawee from his obligation to the drawer in respect of an equivalent amount of the funds in his hands against which the bill is drawn.

The provisions in the Savings Banks and other Acts as to discharges by minors must be regarded as inserted to meet exceptional cases or *ex majore cautela*. If the account has been opened by a father or guardian paying in money to be drawn on by the infant, the banker can incur no risk by applying the money according to directions, any more than does a trustee in paying money to an infant by way of allowance under the terms of a trust.

Overdrafts are money lent (f), and, as such, could never be recovered against an infant customer. Any security given by an infant for such overdraft would be void (g). Whether a guarantor for an infant's overdraft would be held liable, either as such guarantor or as being, in substance, the principal debtor, is perhaps open to doubt in view of the recent decision of OLIVER, J., in *Coutts & Co. v. Browne-Lecky (h)*, distinguishing *Wauthier v. Wilson (i)*. These cases are discussed below in the chapter on "Guarantees".

If a banker allows an infant customer, say a subaltern or undergraduate, to overdraw, the banker must not disclose the fact to anyone, to the infant's father or guardian, for instance.

E. PARTNERS

In partnership accounts one partner has a *prima facie* right

(c) [1914] 3 K.B. 607.

(d) (1829), 4 C. & P. 104.

(e) (1876), 1 Q.B.D. 460 ; 28 Digest 162, 198.

(f) *Blackburn and District Benefit Building Society v. Cuntiffe, Brooks & Co.* (1885), 29 Ch. D. 902 ; 3 Digest 263, 805 ; *Cuthbert v. Roberts, Lubbock & Co.*, [1909] 2 Ch. 226 ; 3 Digest 261, 788.

(g) *Nottingham Permanent Benefit Building Society v. Thunston*, [1903] A.C. 6 ; 32 Digest 294, 696.

(h) [1946] 2 All E.R. 207.

(i) *Wauthier v. Wilson* (1912), 28 T.L.R. 239 ; 28 Digest 174, 353.

to draw in the firm's name. A post-dated cheque drawn by one partner in favour of another and fraudulently negotiated was upheld in *Guildford Trust, Ltd. v. Goss* (j), on the ground that there was nothing to put the transferee on inquiry. A partner has authority also to stop a cheque drawn in the name of a firm by another partner (k). In a case (l) before the Partnership Act, 1890, MALINS, V.C., laid down that a surviving partner was entitled to draw generally on the account. The Partnership Act, 1890, s. 33 (m), provides that, in the absence of agreement to the contrary, the death of any one partner works a dissolution of the partnership, though the surviving partners have power to bind the firm and continue business so far as is necessary for winding up its affairs (n).

The banker in such a case is safe in dealing with the surviving partners only to such an extent as is clearly within this purpose (o). Similarly, the bankruptcy of one partner dissolves the firm in the absence of any provision to the contrary in the partnership articles, and the bankrupt partner has thereafter no authority to bind it (p). A bank has no lien on a partner's private account for an overdraft on partnership account (q).

F. EXECUTORS AND TRUSTEES

Executors

Executors in law constitute only one person. In the absence of express provision, any one executor can operate on an executorship account, and the death or resignation of one does not necessitate any modification of the course of business.

Trustees

Trustees stand on a different footing. The appointment of several trustees is for the express purpose of ensuring that the property shall be under their combined control (r). Delegation of his powers is not permitted to a trustee (s), especially when such delegation involves exclusive dealing with the property. The signatures of all the trustees should therefore be required on all cheques unless modification of the rule is fully authorised by the terms of the trust. The Trustee Act, 1925, s. 25 (t), allows delegation, but only in the case of a trustee intending to

(j) (1927), 136 L.T. 725; Digest Supp.

(k) *Gaunt v. Taylor* (1843), 2 Hare, 413; 3 Digest 176, 315.

(l) *Backhouse v. Charlton* (1878), 8 Ch. D. 444; 36 Digest 357, 341.

(m) 12 Halsbury's Statutes 543.

(n) *Ibid.* s. 38; 12 Halsbury's Statutes 545; cf. *Dickson v. National Bank of Scotland*, [1917] S.C. (H.L.) 50; 3 Digest 192, 400 *in*.

(o) *Re Bourne, Bourne v. Bourne*, [1906] 2 Ch. 427; 36 Digest 396, 680.

(p) Partnership Act, 1890, ss. 33, 38; 12 Halsbury's Statutes 543, 545.

(q) *Watts v. Christie* (1849), 11 Beav. 546; 3 Digest 292, 913.

(r) Cf. *Attenborough v. Solomon*, [1913] A.C. 76; 23 Digest 390, 4607.

(s) See *Re Flower (C.) and Metropolitan Board of Works, Re Flower (M.) and Same* (1884), 27 Ch.D. 592; 43 Digest 882, 3251.

(t) 20 Halsbury's Statutes 116.

remain out of the United Kingdom for more than a month, and such delegation is subject to strict conditions (*u*).

It has been contended that s. 23 (*w*) authorises delegation by trustees so that they may appoint one or more of their number to sign cheques. This is not so. Sub-section 1 of that section only authorises the employment of an outside agent of a specified class appointed by all the trustees, entitled to be paid, to do or carry through specific business. Sub-section 2 authorises the similar appointment of an agent with larger powers, where the subject matter is outside the United Kingdom.

The Act does, however (*y*), provide for the carrying on of trust business for the time being by the surviving trustees or trustee or the personal representatives of a last surviving trustee.

As to when executors or administrators develop into trustees, see *Attenborough v. Solomon* (*z*).

G. JOINT STOCK COMPANIES

The Companies Act, 1929, came into force on 1st November 1929. It repeals both the 1908 (*a*) and the 1928 (*b*) Acts and is a consolidating and amending measure. Its main provisions concern the internal regulation of companies and the protection of shareholders, actual or prospective, and of persons advancing money on the security of the company's property or assets. It has no special bearing on banking, save in the particulars hereinafter referred to.

Section 30 (*c*) reproduces s. 77 of the Companies (Consolidation) Act, 1908, and is the only enactment which regulates the execution or transfer by a joint stock company of bills or notes, and consequently its liability thereon, and the title of persons taking them from agents of the company.

The banker's relation to joint stock companies, as customers, is mainly through the medium of bills and cheques, and it is therefore of supreme importance that the interpretation and effect of this section should not be a matter of doubt or question.

Unfortunately, such is far from being the case, and the present position is one of concern to those who have to deal with the question. Section 30 reads as follows :

"A bill of exchange or promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority."

Cheques are not included by name, nor does the word 'drawn' occur. It is unthinkable that cheques should be

(*u*) Cf. *Green v. Whitehead*, *EVE, J.*, (1929), *Times*, July 13th; affirmed, though on somewhat different ground, [1930] 1 Ch. 38; *Digest Supp.*

(*w*) 20 Halsbury's Statutes 113.

(*y*) S. 18; 20 Halsbury's Statutes 109.

(*z*) [1913] A.C. 76; 23 *Digest* 390, 4607.

(*a*) Companies (Consolidation) Act, 1908.

(*b*) Companies Act, 1928.

(*c*) 2 Halsbury's Statutes 791.

excluded from the section, and they must be taken to be within it, either on the principle that the greater includes the less or because the Bills of Exchange Act makes a cheque a bill of exchange. 'Made' must be read to include 'drawn', which, after all, is the usual term used in relation to bills. The "Journal of the Institute of Bankers," vol. L (1929), p. 399, takes the same view.

The section appeared in practically the same form in the Companies Act, 1862, s. 47 (d), and has remained so ever since. The old doctrine, based on this section and the manifest impossibility of a company's dealing with negotiable instruments otherwise than by derogated authority, was that if the memorandum and articles of association of the company authorised delegation to a specified officer or member of a specified class, or generally, of the power to sign negotiable instruments on its behalf, any person dealing honestly, reasonably, and for value with a man who might have been entrusted with such delegated power was protected, although he had no actual knowledge of the power of delegation, and although the professing agent had never been actually appointed and had affixed and used the signature fraudulently and for his own dishonest purposes. It was held that implied authority of this sort was sufficient under s. 77 above quoted. The chief cases in support of this view are *Biggerstaff v. Rowatt's Wharf, Ltd.*, *Howard v. Rowatt's Wharf, Ltd.* (e), *Hambro v. Burnand* (f) *Re Land Credit Co. of Ireland Ex parte Overend, Gurney & Co.* (g), *Dey v. Pullinger Engineering Co.* (h), *Morison v. London County and Westminster Bank, Ltd.* (j).

But a series of recent cases, in most of which banks have been concerned, has seriously impugned this position and on various grounds. The cases are *Underwood (A. L.), Ltd. v. Bank of Liverpool*, *Same v. Barclays Bank* (k), *Houghton & Co. v. Nothard, Lowe and Wills* (l), *Kreditbank Kassel, G.m.b.H. v. Schenkers* (m), *Stewart (Alexander) & Son of Dundee, Ltd. v. Westminster Bank, Ltd.* (n), *Liggett (B.) (Liverpool), Ltd. v. Barclays Bank, Ltd.* (o). The judgments in these cases lay down or involve the following propositions :

- (1) you cannot rely on a power of delegation unless you knew it existed at the time you dealt with the professing agent ;
- (2) if you knew of the power of delegation, you were not entitled to assume it had been exercised in favour of any

(d) 25 and 26 Vict. c. 89. (e) [1896] 2 Ch. 93 ; 9 Digest 530, 3502.

(f) [1904] 2 K.B. 10 ; 26 Digest 50, 345.

(g) (1869), 4 Ch. App. 460 ; 9 Digest 641, 4232.

(h) [1921] 1 K.B. 77 ; 9 Digest 531, 3506.

(i) [1914] 3 K.B. 356 ; 6 Digest 109, 746.

(k) [1924] 1 K.B. 775 ; Digest Supp.

(l) [1927] 1 K.B. 246 ; affirmed, [1928] A.C. 1 (decided in the House of Lords on the special facts, not general principle) ; Digest Supp.

(m) (1927) 1 K.B. 826 ; Digest Supp.

(o) [1928] 1 K.B. 48 ; Digest Supp.

(n) [1926] W.N. 271.

official to any greater extent than was to be inferred from the position that that official occupied or was held out by the company as occupying ;

- (3) if the articles give power of delegation, you must go further and inquire whether or not the directors had in fact nominated the particular individual to sign the instruments.

Some of these cases, particularly *Stewart's*, further introduce a 'being put on inquiry' test, something between notice and negligence, inconsistent with the accepted rule as to *bona fides* laid down by LORD HERSCHELL in *London Joint Stock Bank v. Simmons* (p).

In the *Stewart Case* there were *dicta* or remarks from the Bench indicating dissent from the rule that fraudulent abuse of authority does not affect that authority to the prejudice of one who has dealt honestly and for value with the fraudulent agent.

These remarks cannot possibly carry weight in face of such established authorities as *Bank of Bengal v. Fagan* (q), *Hambro v. Burnand* and *Dey v. Pullinger Engineering Co.*, *ubi supra*. The judgment of the House of Lords in the *Houghton Case* is not conclusive. It is based solely on the particular facts of that case, and does not profess to deal with general principles.

The *Kreditbank Kassel Case* raises a new and serious question. The judge at the trial had found that the agent had imputed authority to sign the bills. The Court of Appeal, while doubting, did not dissent from this conclusion. They decided that his drawing and indorsing the bills in the usual representative form on behalf of the company without authority and for his own fraudulent purposes constituted forgery within the Forgery Act, 1913, being a false statement that he was acting for the company, and that therefore the bills were absolutely void under s. 24 of the Bills of Exchange Act (r).

It might be argued that the language used, possibly supplemented by reference to the Criminal Justice Act, 1925, s. 35, sub-s. 1 (s), is wide enough to include the case of, say, a managing director having absolute authority to draw or indorse cheques in his representative capacity, but fraudulently abusing and misusing that authority.

On both these points, the limits of imputed authority and the question of forgery, it is submitted that it ought not to be accepted that the pre-existing law is annulled either by the recent cases or the above-mentioned forgery legislation. The interests of banking demand that the broader view as to imputed authority should be maintained, the narrower as to forgery, viz., that if the physical operation of signing is authorised, either actually or by implication, its fraudulent utilisation does not

(p) [1892] A.C. 201 ; 3 Digest 271, 844.

(q) (1849), 7 Moo. P.C.C., at p. 72.

(r) 2 Halsbury's Statutes 46.

(s) 11 Halsbury's Statutes 417.

vitate the document. As to the latter, see further *Bryant Powis and Bryant v. La Banque du Peuple*, *Bryant Powis and Bryant v. Quebec Bank* (t), and 'Forgeries', *post*, p. 259.

Equally important is it that there should be no tampering with the vital distinction between honesty and negligence.

Meanwhile, it behoves bankers to be more strict than ever, when opening accounts with joint stock companies, to get the fullest possible written authority and information as to the persons authorised to sign negotiable instruments on the company's behalf and as to the form of signature, so as to be able, in case of difficulty, to fall back on the old doctrine of 'holding out'. If the bank receive instructions from the company as to the form in which cheques will be drawn, they can, so long as they comply with such instructions, debit the company with such cheques, although the persons drawing them and not the company might be liable to third parties thereon (u).

Much the same position arises in a banker's dealings with a company customer apart from cheque operations. It was once thought that the *Royal British Bank Case* (w) stated correctly the banker's position: "Persons dealing with a company are bound to read the registered documents, and to see that the proposed dealing is not inconsistent therewith. But they are not bound to do more; they need not inquire into the regularity of the internal proceedings." This decision must, however, be considered in relation to the recent ones discussed above: *Underwood*, *Houghton*, *Kreditbank Kassel*, *Stewart*, and *Liggett*, for the same limitations which they raise in regard to cheque operations apply, *mutatis mutandis*, to any dealings which of necessity involve a delegated authority.

Voluntary Winding-up

Under the Companies Act, 1929, voluntary winding-up is deemed to begin on the passing of the resolution. The resolution must be advertised in the *Gazette* within seven days. After the passing of the resolution the company must cease to carry on business, except for the purposes of the winding-up. On the appointment of a liquidator the powers of the directors cease, subject to special sanction—ss. 232–241 (y). In *Re London and Mediterranean Bank, Bolognesi's Case* (z), a bill accepted by a director after liquidators had been appointed in a voluntary winding-up was held not to be the bill of the company. GIFFORD, L.J., said: "Under the 5th clause of s. 133 (a), the powers of the directors ceased on the commencement of

(t) [1893] A.C. 170, at p. 180; 6 Digest, 111, 755.

(u) Cf. *Mahoney v. East Holyford Mining Co.* (1875), L.R. 7 H.L. 869, 889; 9 Digest 642, 4239.

(w) *Royal British Bank v. Turquand* (1856), 6 E. & B. 327; 9 Digest 97, 406.

(y) 2 Halsbury's Statutes 930–936.

(z) (1870), 5 Ch. App. 567; 10 Digest 990, 6854.

(a) Companies Act, 1862 (25 and 26 Vict. c. 89),

the winding-up". That sub-section is, however, in exactly the same words as ss. 232 and 241 of the 1929 Act (*b*). It might, therefore, be argued that a cheque drawn by directors after the resolution, but before appointment of liquidators, was the company's cheque.

Much of the reasoning of CHITTY, J., in *Re Oriental Bank Corporation, Ex parte Guillemin* (*b*), at p. 640, appears equally applicable to voluntary winding-up and notice of resolution, and it would seem only reasonable that the bank, being agents, should at least be protected with regard to cheques paid before advertisement of the resolution.

Compulsory Winding-up

Here, with one negligible exception (*c*), the winding-up is deemed to begin at the time of the presentation of the petition (*d*). There would seem to be no special provision for cessation of the powers of the directors, and the property of the company does not vest in the liquidator till special order. Section 189 (*e*) seems, however, to imply cessation of such powers on the making of the order, and such was held to be its effect in *Gosling v. Gaskell* (*f*), decided on a previous statute. The petition must be advertised seven days before the date of hearing—Companies Winding-up Rules, 1929, 27 (*g*).

Re Oriental Bank Corporation, Ex parte Guillemin (*h*), was a case of compulsory winding-up and therefore the remarks of CHITTY, J., at p. 640, as to the position of an agent such as a banker, without notice of petition, are directly applicable, especially as it has since been held, or at least intimated, that advertisement of a petition is only notice to those who have actually seen it (*j*).

It has been held that "in determining whether payment made by directors pending a winding-up petition is to be validated by the Court under s. 153 of the Companies Act, 1862," the Court will be guided by "the analogy presented by the protective sections" of the Bankruptcy Act, 1914 (*k*).

But if petition ranks with receiving order or even petition in bankruptcy, this, in view of the relation back, is not much help. Moreover, the banker has no access to the Court under s. 173 (*l*),

(*b*) 2 Halsbury's Statutes 930, 936; cf. *Re Oriental Bank Corporation, Ex parte Guillemin* (1884), 28 Ch. D. 634; 10 Digest 865, 5836.

(*c*) Companies Act, 1929, s. 175; 2 Halsbury's Statutes 894.

(*d*) *Ibid.*, s. 175 (2).

(*e*) 2 Halsbury's Statutes 902.

(*f*) [1897] A.C. 575, at p. 588; 10 Digest 792, 4975.

(*g*) 2 Halsbury's Statutes 1060.

(*h*) (1884), 28 Ch. D. 634; 10 Digest 865, 5836.

(*j*) *Fryer v. Ewart*, [1902] A.C. 187; 10 Digest 996, 6906.

(*k*) *Re Repertoire Opéra Co., Ltd.* (1895), 39 Sol. Jo. 505; 10 Digest 865, 5839.

(*l*) 2 Halsbury's Statutes 892.

or 252 (*m*), being neither liquidator, contributory nor creditor—s. 252 (2).

Appointment of Receiver

The appointment of a receiver is not a winding-up (*n*), and can in no wise affect the rights of persons dealing with the company without notice of it (*o*).

H. LOCAL AUTHORITIES

The constitution and powers of these bodies depend on a mass of statute law now codified in the Local Government Act, 1933. The relation of banks to local authorities has for long been uncertain in many of its aspects, and the Act of 1933 did little to improve the position, in spite of representations by the British Bankers' Association. The Act is a simplifying and codifying measure and neither changes nor clarifies the law as to the status of the treasurer, the capacity of a banking corporation to act as treasurer, the administrative requirements concerning transactions between banks and local authorities and the contractual capacity of the latter. At the same time, this statute effected an improvement in the conditions applicable to temporary borrowing—though the precise effect of the section, 215 (*p*), is in doubt. The purposes for which, the mode in which, local authorities may borrow, and the security which they may offer, are provided for mainly in ss. 195–197 (*q*) of the Act. Section 215 empowers a local authority, without the consent of any sanctioning authority, to borrow by way of temporary loan or overdraft from any bank or otherwise (*a*) for the purpose of defraying expenses pending the receipt of revenues receivable in respect of the period of account in which those expenses are chargeable and taken into account in the estimates made by the local authority for that period; and (*b*) for the purpose of defraying, pending the raising of an authorised loan, expenses intended to be paid out of that loan. In the "Journal of the Institute of Bankers," vol. lviii, at p. 22, the opinion is given that a local authority must prepare estimates in order to take advantage of the section (215 (*a*)), the significance being that the particular borrowing must be tied to the accounting period for the banker to be free from liability to make inquiries as to its validity and to plead s. 203 (*r*) which reads:

"A person lending money to a local authority shall not be bound to inquire whether the borrowing of the money is legal or regular or

(*m*) 2 Halsbury's Statutes 940.

(*n*) *Moss Steamship Co., Ltd. v. Whinney*, [1912] A.C. 254, at p. 274; 10 Digest 797, 5033.

(*o*) *Re Arauco Co., Ltd.* (1898), 79 L.T. 336; 10 Digest 757, 4733; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373; 10 Digest 760, 4747.

(*p*) 26 Halsbury's Statutes 422.

(*q*) 26 Halsbury's Statutes 412, 413.

(*r*) 26 Halsbury's Statutes 416.

whether the money raised was properly applied, and shall not be prejudiced by any illegality or irregularity in the matters aforesaid or by the misapplication or non-application of any such money."

It is, however, not easy to see why failure on the part of the lender to ensure that there is no irregularity under s. 215 (a) should preclude his pleading s. 203, for this section is surely drawn wide enough to cover the lender, in cases where the irregularity does not obviously follow from the statute and in which the lender is bound to rely largely, if not entirely, on the word of the local authority.

As to appointment of treasurer and form of drafts on him, see *post*, pp. 141-144.

CHAPTER 3

RELATION OF BANKER AND CUSTOMER

SUMMARY—

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UP to a recent date, the universal formula for the relation of banker and customer was based on *Foley v. Hill* (a), and defined it as that of debtor and creditor with the superadded obligation of honouring the customer's cheques when there was a sufficient and available credit balance. If the proposition was amplified, it stated the debt due from the banker to be repayable on demand, but the inclusion of these words was not regarded as in any way affecting the situation. They were treated, and judicially recognised, by SCRUTTON, J., in *Bradford Old Bank, Ltd. v. Sutcliffe* (b), as being 'meaningless', in the same sense as a promissory note payable 'on demand' is enforceable without any previous request for payment. So also, in the same case, PICKFORD, L.J., says that 'on demand' has no effect in the case of money lent (c).

Moreover, the view that the banker's debt was of this nature was justified by the opinion of LORD LYNTHURST, L.C., in the earlier stages of *Foley v. Hill* and by the judgments in *Pott v. Clegg* (d), and *Re Tidd, Tidd v. Overell* (e), which recognised the banker's debt as subject to the Statutes of Limitation, and so, indirectly, as being at all times immediately due and recoverable.

But all along it was common legal knowledge that there were debts which were really not payable except on demand, nor enforceable till after demand. The distinction is drawn in *Walton v. Mascall* (f) :

"It is quite clear that a request for the payment of a debt is quite immaterial unless the parties to the contract have stipulated that it shall be made ; if they have not, the law requires no notice or request, but the debtor is bound to seek out the creditor and pay him when the debt is due."

The test is whether the parties have agreed that demand

(a) (1848), 2 H.L. Cas. 28 ; 3 Digest 168, 272.

(b) [1918] 2 K.B. 833 ; 3 Digest 264, 809.

(c) *Ibid.*, p. 839.

(d) (1847), 16 M. & W. 321 ; 3 Digest 169, 276.

(e) [1893] 3 Ch. 154 ; 3 Digest 193, 402.

(f) (1844), 13 M. & W. 452, at p. 455 ; 6 Digest 226, 1418.

shall be a condition precedent to the existence of a present enforceable debt.

The judgment of the Court of Appeal in *Joachimson v. Swiss Bank Corporation* (g), has completely altered the legal position, laying down the principle that the banker's debt is not repayable without previous demand ; that previous demand is a condition precedent to its constituting a present enforceable debt.

In that case, a partnership having been dissolved by death on August 1, 1914, the question arose whether the sum of £2321 standing to the firm's credit on current account at that date, no demand of payment having been made, constituted, at that time, an immediately recoverable debt affording a cause of action to the firm for money lent or money had and received. The opinion of the Court, as enunciated by BANKES, L.J., was "We all think a demand is necessary". Considered judgments were delivered to the same effect.

The cases to the contrary were explained away on the ground that this point was not directly in issue or necessarily involved in their decision. Admittedly this was so in the House of Lords when deciding *Foley v. Hill*, the only question being the existence or non-existence of any fiduciary character in the banker with regard to money paid in by the customer (h). And it was pointed out that LORD LYNDRHURST in the same case, though he was of opinion that the Statutes of Limitation applied, used the words "he has contracted to repay to his principal when demanded". Then the following significant passage from the judgment of BRETT, J., in *Schroeder v. Central Bank of London, Ltd.* (i), was cited :

"This is not a case of the drawer going himself and demanding all the money in his banker's hands, and I am myself inclined to think that it might be put in this way : that there was no debt on which an action against the defendants could be founded until a sum was demanded, and that when this cheque was drawn there was no debt which could be assigned, and consequently there can be no debt owing by the defendants to the plaintiff."

But the ruling motive of the judgments was that if the doctrine of the immediately recoverable right was admitted, consequences would follow which were obviously not contemplated by either party and would render banking a non-business proposition. The latter consideration has been somewhat derided by earlier judges, but was allowed proper weight here. It was pointed out that, if the old theory were followed out to its logical conclusions, the banker would be entitled to tender the amount of his credit balance to the customer at any moment, anywhere, and then dishonour outstanding cheques, to the possible ruin of the customer ; a procedure utterly inconsistent

(g) [1921] 3 K.B. 110 ; 21 Digest 639, 2188.

(h) See *Kearison v. Glyn, Mills, Currie & Co.* in the House of Lords (1911), 81 L.J.K.B. 465 ; 3 Digest 170, 282.

(i) (1876), 34 L.T. 735 ; 3 Digest 175, 310.

with the series of decisions establishing the customer's right not to have his account summarily closed. On the other hand, the customer would be justified in demanding his money at any branch of the bank, irrespective of where his account was kept; again a subversion of the established and legally recognised principles of banking.

It was clearly a case for application of the indubitable, but strenuously limited and sparingly employed, legal principle of reading into a contract terms and conditions which must inevitably have been in the contemplation of the parties and without which the contract would be commercially ineffectual.

BANKES, L.J., in taking this line, referred to *Macmillan's Case (j)*, as illustrating how collateral obligations could be superadded to the primary relation of banker and customer. This is, perhaps, not setting the question on its strongest basis. *Macmillan's Case* went solely on one of the twofold aspects of banking, the debtor and creditor element and the mandant and mandatory, involved in the issue of cheques. The obligation to take care in drawing the cheques there re-established was solely the direct outcome of the latter relation, by no means confined to banker and customer, and having no normal connection with debtor and creditor.

More artistic and convincing is the view taken by ATKIN, L.J. He rejects altogether the conception of the dual relation. He says the contract of banker and customer is one and indivisible. Applying the doctrine above referred to so liberally as almost to trench on the prohibited area of making a contract for the parties, he formulates the contract or relation entered into between the banker and the intending customer in terms of which it is difficult to eliminate or even criticise any item. This he does as follows, at p. 127 :

"The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept and during banking hours. It includes a promise to repay any part of the amount due, against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine."

The Court held that the issue of a writ by the customer

(j) *London Joint Stock Bank, Ltd. v. Macmillan and Arthur*, [1918] A.C. 777; Digest 172, 293.

would be a sufficient demand without any previous request for payment.

This is somewhat anomalous, inasmuch as a writ presupposes an existing cause of action at the date of its issue. No customer is likely to adopt so unnecessary and unreasonable a procedure; if he did, and the action proceeded, the Court would probably mark their disapproval of his conduct by making him pay the costs, or the bank could at once pay the money into Court and so reduce the costs to a negligible minimum.

The points on which this judgment really affects the banker are :

1. as to the limitation of actions ;
2. as to garnishee proceedings served on the banker ;
3. as to assignments of the credit balance on current account or part thereof.

SECTION 1.—LIMITATION OF ACTIONS

The Limitation Act, 1939, has no application until there is a debt actually due and recoverable. It follows, therefore, from *Joachimson v. Swiss Bank Corporation* (*k*), that in the case of a credit balance on current account, the statute does not begin to run against the customer until demand for payment has been made and not complied with.

Bankers are not in the habit of setting up the statute against any legitimate claim, and the only practical bearing of the decision in this respect would seem to be with regard to the much discussed and exaggerated subject of unclaimed balances. As to presumption of repayment after lapse of time, see *ROCHE, J.*, in *Douglass v. Lloyds Bank, Ltd.* (*l*).

The converse case of an overdraft by the customer is not within the purview of this decision, and it is in no way affected thereby. Overdraft is not uncommon, but it could hardly be argued that, in ordinary circumstances, a prospective overdraft was so essentially present to the minds of the parties when the account was opened, or provision for it so vital to the business efficacy of the contract, that a Court would be justified in importing terms relative thereto into a contract otherwise complete. There is the authority of *Parr's Banking Co., Ltd. v. Yates* (*m*), that the statute runs from the date of each advance, even when the advances are guaranteed. The case is overruled, so far as the guarantor is concerned, by the judgment of the Court of Appeal in *Bradford Old Bank, Ltd. v. Sutcliffe* (*n*). But this does not touch the liability of a principal or non-guaranteed debtor. A course of business might be established

(*k*) [1921] 3 K.B. 110 ; 21 Digest 639, 2188.

(*l*) (1929), 34 Com. Cas. 263 ; Digest Supp.

(*m*) [1898] 2 Q.B. 460 ; 3 Digest 267, 828.

(*n*) [1918] 2 K.B. 833 ; 3 Digest 264, 809.

by which a banker who has acquiesced for a reasonable period in overdrafts to a certain amount would be precluded from withdrawing such accommodation and dishonouring cheques without notice (*o*), but this does not necessarily preclude the operation of the statute. In the absence of some definite agreement as to demand or date of repayment, it is best to consider the statute as running from the date of each advance.

The point is, however, of minor practical importance. A banker is not likely to let an overdrawn account lie absolutely dormant for six years, even from the date of the earliest advance, without some payment on account or as interest, or some other acknowledgment sufficient to bar the statute; and the principle of appropriation of payments in would, in the vast majority of cases, operate to the same end.

The effect of war is to make both legally and practically impossible any intercourse between subjects of this country and enemy subjects, whether natural or by virtue of the Trading with the Enemy Act, 1939 (*oo*). This rupture of communication makes no allowance for the passing of time within the meaning of the Limitation Act and it is accordingly bridged through the medium of such a statute as the Limitation (Enemies and War Prisoners) Act, 1945 (*p*), which provides that the period prescribed for the bringing of any action "shall be deemed not to have run while the said person [a necessary party to the action] was an enemy or was so detained [in enemy territory], and shall in no case expire before the end of twelve months from the date when he ceased to be an enemy or to be so detained, or from the date of the passing of this Act, whichever is the later. . . ."

SECTION 2.—GARNISHEE ORDERS

The service of a garnishee order *nisi* on the bank was held by the House of Lords in *Rogers v. Whiteley* (*pp*) to attach and bind the whole of the judgment debtor's balance on current account, irrespective of the amount of the judgment debt. The point, now decided, that the debt on current account was only due and repayable after previous demand, and that no demand had been made, was not raised or considered there. It has long been common practice to garnish current accounts.

And under the judgment in *Joachimson v. Swiss Bank Corporation* (*q*) that practice will presumably continue. The Court distinctly lay down that their judgment will not affect it, assigning as the reason that the service of the garnishee order *nisi* constitutes, by operation of law, a sufficient demand. ATKIN, L.J., alone expressed any doubt in the matter, and he

(*o*) Cf. *Cumming v. Shand* (1860), 5 H. & N. 95; 3 Digest 264, 806.
 (*oo*) 32 Halsbury's Statutes 1092. (*p*) 38 Halsbury's Statutes 293.
 (*pp*) [1892] A.C. 118; 3 Digest 176, 317.
 (*q*) [1921] 3 K.B. 110; 21 Digest 639, 2188.

suggests that after service of the order *nisi* there is ample power to provide for a demand being made before an order for payment is made.

It must be confessed that this view is not easily reconciled with the substantive point in the judgment, namely, that demand is a condition precedent to the existence of an actual immediately recoverable debt. *Ex hypothesi*, there could not, at the time of issue and service of the garnishee order *nisi*, have been any demand on the banker.

Order 45, rule 1, the foundation of the garnishee procedure, only authorises the application for and issue of the order *nisi* where there is a debt owing or accruing due to the judgment debtor; the judgment creditor or his solicitor has to swear to the existence of such debt and the order *nisi* is limited in operation to such debt.

It has been generally understood that the interposition of anything constituting an unfulfilled condition precedent debarred the obligation from being either a debt owing or one accruing due. Thus, if the return of a deposit receipt or a membership book is made a condition of repayment or withdrawal of money, no debt arises until its return (*r*). If money in the hands of a friendly society is only repayable on specified notice and no such notice has been given, it has been held not subject to garnishee proceedings (*s*). And the giving of notice was held as much a condition precedent, when stipulated for, as the return of the membership book or deposit receipt, in *Atkinson v. Bradford Third Equitable Benefit Building Society* (*t*).

Therefore an unfulfilled condition precedent is none the less a bar to garnishee proceedings because it lies with the judgment debtor to perform it or not as he wills. And on this basis there would seem to be no effective distinction between a condition precedent and a contingency.

Debts owing and accruing due

The test of 'a debt owing' is whether it is one for which the creditor could have immediately and effectually sued (*u*). The definition of 'debt accruing due' given by the Court of Appeal in *Webb v. Stenton* (*w*), and adopted in many subsequent cases, is *debitum in praesenti solvendum in futuro*. In *Tapp v. Jones* (*x*), LORD BLACKBURN says,

"the meaning of accruing debt is *debitum in praesenti solvendum in futuro*, but it goes no further, and it does not comprise anything which

(*r*) *Re Dillon, Duffin v. Duffin* (1890), per COTTON, L.J., 44 Ch. D. 76; 3 Digest 195, 411; *Re Tidd, Tidd v. Overell*, [1893] 3 Ch. 154; 3 Digest 193, 402.

(*s*) *Cowley v. Taylor, Ackers, Garnishees* (1908), 124 L.T. Jo. 569, per RIDLEY and DARLING, JJ.

(*t*) (1890), 25 Q.B.D. 377; 7 Digest 487, 202.

(*u*) *Glegg v. Bromley*, [1912] 3 K.B. 474; 12 Digest 212, 1702.

(*w*) (1883), 11 Q.B.D. 518; 21 Digest 625, 2107.

(*x*) (1875), L.R. 10 Q.B. 591; 21 Digest 624, 2105.

may be a debt, however probable, or however soon it may be a debt."

It follows from this that moneys paid into a banking account after the service of a garnishee order *nisi* are not attached by it. On this point *Webb v. Stenton* was cited with approval of the Court of Appeal, reversing the St. Albans County Court Judge, in *Heppenstall v. Jackson and Barclays Bank, Ltd.* (y).

LINDLEY, L.J., in *Webb v. Stenton*, *ubi supra*, says,

"An accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation."

LORD LINDLEY'S definition is possibly open to two constructions, but the words "*not yet actually payable*" and "*an existing obligation*" are more consistent with a debt which, though not immediately payable, is actively maturing, and will automatically become due and payable at a definite future date, like the acceptor's contract on a bill at three months'. *Solvendum* has an imperative significance, implying external compulsion, while 'accruing', which is, after all, the word actually used and governing, means in ordinary language that which is of its own mere motion approaching a person at a fixed point (z).

The case of *O'Driscoll v. Manchester Insurance Committee* (a), quoted in the *Joachimson Case* (b) in support of the wider interpretation of the term *debitum in praesenti solvendum in futuro*, is not convincing. In that case a panel doctor had earned fees. It is expressly stated that there was no contingency which could happen to deprive him of his right to payment on figures being finally adjusted, and that the insurance society was in funds to pay. Therefore in the ordinary course of affairs the doctor would have been paid a definitely ascertained sum at an automatically approaching date without any demand on his part. Garnishee proceedings were therefore appropriate.

And in this very case, BANKES, L.J., lays down the following propositions :

"If a sum of money is payable on the happening of a contingency, there is no debt owing or accruing."

"He (the judgment creditor) is only entitled to stand in the shoes of the judgment debtor."

"If the order as expressed has the effect of expediting the date of payment, I think it is wrong."

In *Cowley v. Taylor, Ackers, Garnishees* (c), the judgment creditor instituted garnishee proceedings against a friendly society of which the judgment debtor was a member, and in the funds of which he was interested. The rules provided that

(y) [1939] 1 K.B. 585 ; [1939] 2 All E.R. 10 ; Digest Supp.

(z) See the examples cited in *Jones v. Thompson* (1858), E.B. & E. 63 ; 21 Digest, 625, 2109.

(a) [1915] 3 K.B. 499, C.A. ; 21 Digest 634, 2156.

(b) [1921] 3 K.B. 110 ; 21 Digest 639, 2188.

(c) (1908), 24 L.T. Jo. 569.

members desiring to withdraw funds from the society must give written notice of their intention. No such notice was given by the judgment debtor. Held by RIDLEY and DARLING, JJ., that where notice was required to be given in order to obtain a sum of money by the persons to whom it was due, such money was not recoverable by garnishee proceedings.

If contingency be the only valid objection to a 'debt accruing due', this case shows that the exercise or non-exercise of a person's volition is a contingency.

The Court of Appeal in the *Joachimson Case*, having decided that there was no debt actually owing, must, in order to preserve the application of any garnishee proceedings, have come to the conclusion that the current account credit balance constitutes a debt accruing due, although no demand of payment has been made.

Effect of order *nisi*

The Court hold that the "service of the garnishee order *nisi* is, by operation of law, a sufficient demand to satisfy any right the banker may have as between himself and his customer to a demand before payment of moneys standing to the credit of a current account can be enforced". They accord to it the same effect as if the demand had been made by the judgment debtor customer himself prior to the garnishee order *nisi* being applied for; that is, the whole current account credit balance is attached and dealt with under the order.

The line of reasoning seems to be: Here is a debt accruing due, but the date at which it becomes absolutely due and payable must be fixed by demand; the law will, in the interest of the judgment creditor, take this matter of demand out of the hands of the judgment debtor and enforce it by the machinery of the garnishee procedure.

It may be asked what else could be done where a demand is necessary to fix the actual date of payment of a debt accruing due, and circumstances preclude such demand being made by the creditor. The answer is that the difficulty could only arise if 'accruing due' is to be extended to cover debts other than those 'accruing due' in the strict sense, namely, at a fixed or determinable date.

In any case, the garnishee procedure does not seem intended or designed to be so used.

Nature of garnishee procedure

It is a summary process, only to be applied within its specified limits and subject to its specified conditions.

The case of *Cowley v. Taylor, Ackers, Garnishees (d)*, before referred to, decided that where notice was required before

money paid into a friendly society could be reclaimed, and such notice had not been given by the member, garnishee proceedings against the society, founded on a judgment against the member, could not be maintained. This case seems much in point in the present instance, especially as the County Court Judge, whose judgment the Divisional Court held to be right, had decided on the ground that until the member gave notice of withdrawal of the amount due to him there was no debt due from the society to the judgment debtor which could be the subject of garnishee proceedings.

White, Son and Pill v. Stennings (e) turned on the question whether the judgment debt still remained unsatisfied within the County Court rules, identical with Order 45, rule 1, the judgment having directed payment at a future date, before which garnishee proceedings were instituted; but remarks of the Court of Appeal indicate that the process, being a species of execution, should only be applied where the state of circumstances fully justifies its application. VAUGHAN WILLIAMS, L.J., said,

"I think that garnishee proceedings are a species of execution and that a judgment creditor should not be allowed to take out a garnishee summons or get an order thereon under Order 45, rule 1, if the state of things is such that he cannot issue execution under the judgment."

And at p. 431 KENNEDY, L.J., says,

"It is no argument, I think, to say that upon the view contended for by the plaintiffs, the County Court Judge can find some way of working out the rule so as to do no injustice to the judgment debtor; the question is whether, under the terms of the rule, there is jurisdiction to allow these summonses to be issued."

To treat the order *nisi* as the equivalent of the prior demand is to substitute the judgment creditor for the judgment debtor and to make the former the customer and creditor of the bank.

"A garnishee order does not operate to transfer the debt and does not constitute the garnishor a creditor either at law or in equity of the garnishee" (f). So also, in *Norton v. Yates (g)*, it was held that a garnishee order is not an assignment of the debt. It gives merely an equitable charge (h).

Even the order absolute does not make the judgment creditor a creditor of the garnishee, though he has power to give a receipt (i).

The judgment creditor is, no doubt, frequently spoken of as standing in the shoes of the judgment debtor, as, for instance, by MOULTON, L.J., in *Glegg v. Bromley (j)*, but this is invariably applied in restriction, not in extension, of the rights of the

(e) [1911] 2 K.B. 418; 21 Digest 617, 2050.

(f) *Per* LAWRENCE, J., in *Re Steel Wing Co.*, [1921] 1 Ch. 349; 10 Digest 821, 5346.

(g) [1906] 1 K.B. 112; 10 Digest 763, 4770.

(h) *Galbraith v. Grimshaw*, [1910] A.C. 508; 21 Digest 618, 2058.

(i) *Re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch. D. 99, C.A.; 10 Digest 835, 5465.

(j) [1912] 3 K.B. 474, at p. 484; 12 Digest 212, 1702.

former. In *O'Driscoll v. Manchester Insurance Committee* (k), BANKES, L.J., as before quoted, speaks of the judgment creditor as *only* standing in the shoes of the judgment debtor.

Lastly, if the debt is not payable till after demand and no demand has been made, treating the order *nisi* as demand is expediting the date of payment, a result which, according to BANKES, L.J., shows that the process has been wrongly put in motion, and is inapplicable. It is moreover illogical that the service of an order *nisi* should be regarded as a demand sufficient to render a current account balance available, but not a deposit at notice. Admittedly a current account balance is actionable on demand, whether by cheque or by any other form, whereas a deposit at notice is not until notice is given and the period has expired. But it would seem logical to argue that if service of a garnishee order *nisi* is enough to render a current account actionable so as to enable it to be attached, the order should have some effect on a deposit at notice.

These considerations make it difficult to accept unhesitatingly the applicability of the garnishee procedure as enunciated in *Joachimson v. Swiss Bank Corporation* (l). However, it is a binding authority, and the banker must take it that when he receives a garnishee order *nisi* based on a judgment against a customer, unless, as elaborated below, such order is stated to be for a specific sum only, it binds the whole of that customer's credit balance on current account as heretofore, albeit the banker has received no demand for payment from the customer. This view was taken by GREER, L.J., in *Hirschorn v. Evans* (ll), in which he dissented from SLESSER and MACKINNON, L.JJ.

An order emanating from a County Court has presumably the same effect as one issued by the High Court (m).

Service of the garnishee order *nisi* has been treated as binding any amount credited as cash on uncleared cheques (n). In view of the decision in *Underwood (A. L.), Ltd. v. Barclays Bank* (o) and the general disposition to regard mere crediting as cash as not constituting the banker a holder for value, this would probably not hold good now. The case of *Rekstin v. Severo Sibirsko Gosudarstvernnoe Akcionernoe Obschestro Kom-severputj and Bank for Russian Trade* (p), is interesting in this connection. The bank, on instructions from the Bureau, transferred the latter's balance to the account of the Trade Delegation of the U.S.S.R., which body enjoyed diplomatic privilege. The Delegation was not, however, advised of the transfer. At the hearing of a garnishee order served after the transfer was effected, it was held that there having been no

(k) [1915] 3 K.B. 499 ; 21 Digest 634, 2156.

(l) [1921] 3 K.B. 110 ; 21 Digest 639, 2188.

(ll) [1938] 2 K.B. 801 ; [1938] 3 All E.R. 491 ; Digest Supp.

(m) *Yates v. Terry*, [1902] 1 K.B. 527 ; 21 Digest 638, 2183.

(n) *Jones & Co. v. Coventry*, [1909] 2 K.B. 1029 ; 21 Digest 635, 2158.

(o) [1924] 1 K.B. 775 ; Digest Supp.

(p) [1933] 1 K.B. 47 ; Digest Supp.

communication to the Delegation the instruction was revocable and the balance came under the attachment of the garnishee order, the latter operating as a revocation of the instruction.

The attached account cannot be operated on even by cheques issued before the service of the order.

As against that account the banker therefore is bound in law to dishonour all cheques presented, irrespective of the margin between the balance standing to the credit of the judgment debtor and the amount of the debt plus costs, and he incurs no liability to his customer in so doing (*q*). The statement by MACKINNON, L.J., in *Hirschorn v. Evans* (*qq*), to the effect that "If, upon receiving that summons [for £15 : 7 : 0], the bank had any account open in their books in the name of Lionel Evans, the judgment debtor, it would have been their duty not to allow Lionel Evans to draw cheques upon that account so as to reduce the credit balance below the sum of £15 : 7 : 0," must not be taken to mean the contrary, even though the learned Judge makes the statement twice in the course of his judgment.

It has recently become the practice, however, for garnishee orders to require the attachment of debts due and accruing due up to a stated sum only ; in such cases the banker is free to part with any surplus he may hold on the customer's account, and he cannot later be made to refund any moneys paid away from that surplus, on the ground, at any rate, that the costs of the order bring the total debt to a sum exceeding the limited sum given in the order.

Course to be adopted

Provided the customer is financially substantial, the best course for a bank to pursue is to open a new account, to which cheques presented for payment should be debited and moneys paid in credited. Such payments in are not affected by the garnishee order, inasmuch as the debt they constitute from the banker to the customer was not owing or accruing due at the time of the service of the order (*r*). The bank should at once communicate with the customer (*rr*), stating what has been done and asking for instructions, and should also appear in accordance with the order, and, if the order is made absolute, should pay over the amount of the judgment debt and costs if there is no question of trust money, set-off or the like.

If, at the date of the service of the order, the banker has any lien on or set-off against the moneys attached, this should be represented to the Court and would probably prevail against the garnishee order (*s*).

(*q*) *Rogers v. Whiteley*, [1892] A.C. 118 ; 21 Digest 627, 2121.

(*qq*) [1938] 2 K.B. 801 ; [1938] 3 All E.R. 491.

(*r*) Cf. *Jones & Co. v. Coventry*, [1909] 2 K.B., pp. 1041-1043 ; 21 Digest 635, 2158.

(*rr*) In *Plunkett v. Barclays Bank, Ltd.*, [1936] 2 K.B. 107 ; [1936] 1 All E.R. 653 ; Digest Supp., *DU PARCQ, J.*, suggested that it was a duty.

(*s*) *Tapp v. Jones* (1875), L.R. 10 Q.B. 591 ; 21 Digest, 624, 2105 ; *Stumore v. Campbell & Co.*, [1892] 1 Q.B. 314, C.A. ; 21 Digest 620, 2081.

Order must be clear

It is the business of a judgment creditor who serves a garnishee order *nisi* on a bank to make it quite plain what is the account to be attached, and the bank are not bound to run the risk of attaching a particular account and dishonouring cheques pending the hearing of the summons in doubtful cases where there is a discrepancy of names or like ambiguity (t).

Broadly speaking, a banker is not bound to look beyond the person in whose name the account stands, or recognise rights of any other person ; but it would be obviously improper that a man should be able to put his money out of reach of his creditors by merely banking it under an assumed name. It is clearly the duty of the banker not to lend himself to such subterfuge.

In *Koch v. Mineral Ore Syndicate (London and South Western Bank, Ltd., Garnishees)* (t), the bank, as a matter of courtesy, informed the judgment creditor's solicitors that they had no such account as was sought to be attached. They were asked to attach another account said to be that of the judgment debtor. They declined, and the order *nisi* was subsequently amended ; but the bank were not required to refund cheques paid on that account during the interval.

In *Plunkett v. Barclays Bank, Ltd.* (u), DU PARCQ, J., held that a solicitor's client account was attachable though known to be a trust account ; that the bank was right in refusing to part with the balance and that it was their duty to inform the Court of the claim of the person beneficially entitled. In this connection he cited *Roberts v. Death* (v) to the effect that the Court ought not to make an order absolute where there was reasonable ground for thinking that the money due to the execution creditor was trust money. He did not think that it was ever intended that the garnishee should be compelled to adjudicate on conflicting equities. As to the bank's obligation, the same view was expressed by MACKINNON, L.J., in *Hirschorn v. Evans* (w).

The courts have the power to go behind the ostensible ownership of an account, and would probably exercise it on cogent evidence that the name was really only a blind (x). In *Harrods, Ltd. v. Tester* (y), for instance, a garnishee order was served attaching an account of a woman whose husband supplied all the funds and who signed only with her husband's

(t) *Koch v. Mineral Ore Syndicate (London and South Western Bank, Ltd., Garnishees)* (1910), "Journal of Institute of Bankers", vol. xxxi, p. 459 ; 3 Digest 177, 321.

(u) [1936] 2 K.B. 107 ; [1936] 1 All E.R. 653 ; Digest Supp.

(v) (1881), 8 Q.B.D. 319 ; 21 Digest 629, 2131.

(w) [1938] 2 K.B. 801 ; [1938] 3 All E.R. 491 ; Digest Supp.

(x) Cf. *Pollock v. Garle*, [1898] 1 Ch. 1 ; 3 Digest 308, 1012.

(y) [1937] 2 All E.R. 236.

consent. The Court of Appeal held that, on the authority of *Marshal v. Crutwell* (z), there was in the circumstances a resulting trust in favour of the husband and that the creditors of the wife could not attach the husband's moneys by garnishee process, even though the account stood in her name. Incidentally, in *Hirschorn v. Evans* (a) GREER, L.J., said that in his judgment *Marshal v. Crutwell* had nothing whatever to do with the point which he had to decide in that case, though he cited *Harrods v. Tester* in support of his view that if, following the decision in *Joachimson v. Swiss Bank Corporation* (b), "the garnishee summons was equivalent to a demand by the husband, the husband as well as his wife having the right to demand the payment of the sum, and afterwards moneys were paid on the husband's cheque by the bank, the bank cannot rely on the payment of that which had already been demanded through the garnishee summons by the husband for the purpose of the execution creditor". It is, no doubt, a somewhat difficult position for the banker, but his wisest course seems to be to get in touch with the Court as soon as possible and obtain directions in the matter, when his interests will be safeguarded as in the case above referred to.

Joint Accounts

A current account credit balance in joint names is attachable to answer a joint debt only. As POLLOCK, B., put it in *Beasley v. Roney* (c), "... the debt owing by a garnishee to a judgment debtor which can be attached to answer the judgment debt must be a debt due to the judgment debtor alone, and that when it is only due to him jointly with another it cannot be attached". This had previously been held to be the case in *Macdonald v. Tacquah Gold Mines Co.* (d), and was approved in *Hirschorn v. Evans* (e).

SECTION 3.—ASSIGNMENT OF CREDIT BALANCE

It has been generally held that a credit balance on current account is assignable as a debt under the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 6 (f), which section is now re-enacted in the Law of Property Act, 1925, s. 136 (g).

In *Walker v. Bradford Old Bank* (h), the Court held that the ordinary relation of debtor and creditor existed between the customer and his banker, and consequently that there was an obligation on the banker's part to pay over on demand all moneys then or thereafter standing to the customer's credit;

(z) (1875), L.R. 20 Eq. 328; 3 Digest 190, 391.

(a) [1938] 2 K.B. 801; [1938] 3 All E.R. 491; Digest Supp.

(b) [1921] 3 K.B. 110; Digest Supp.

(c) [1891] 1 Q.B. 509, p. 512; 21 Digest 630, 2135.

(d) (1884), 13 Q.B.D. 535; 21 Digest 630, 2134.

(e) [1938] 2 K.B. 801; [1938] 3 All E.R. 491; Digest Supp.

(f) Repealed by Supreme Court of Judicature (Consolidation) Act, 1925.

(g) 15 Halsbury's Statutes 313.

(h) (1884), 12 Q.B.D. 511; 8 Digest 429, 73.

that, therefore, there was an accruing debt arising out of contract which was assignable under the Judicature Act.

But in *Schroeder v. Central Bank of London, Ltd.* (a) (approved in *Joachimson v. Swiss Bank Corporation* (b)), where it was contended that a cheque operated as an assignment of the amount of the credit balance it represented, BRETT, L.J., held that there was no debt on which any action against the banker could be founded until a sum was demanded, and that, when the cheque was drawn, there was no debt which could be assigned, and consequently there could be no debt owing by the banker to the assignee. On this basis it might be argued that there can be no assignment of a current account, there being no assignable debt till after demand.

The Judicature Act, however, includes choses in action as well as debts, it entitles the assignee to enforce the rights transferred, and applies to future debts. The assignee would be entitled, after notice, to bring an action against the bank; if, as laid down in the *Joachimson Case*, a writ is a sufficient demand, this would seem to dispose of any difficulty.

The assignment, if absolute and not by way of charge only, transfers all the assignor's rights to the assignee (c), and it would be unreasonable if this did not include the right to demand payment if necessary.

If the service of a garnishee order by the judgment creditor without the consent and contrary to the interest of the customer is treated as equivalent to a demand by the latter, it would be queer if the customer's own act, voluntarily and legally performed, did not have the same effect, or transfer the right to demand payment to a person of his own selection.

Whether part can be assigned

There are a series of cases in which the question has been raised whether under these powers of the Judicature Act a debt can be dealt with piecemeal by separate assignments to different persons.

These cases were summarised and reviewed by P. O. LAWRENCE, J., in *Re Steel Wing Co., Ltd.* (d), as follows:

In *Skipper and Tucker v. Holloway and Howard* (e), DARLING, J., held that part of a debt could be assigned under s. 25, sub-s. 6, of the Judicature Act, 1873. His judgment was reversed on the facts, but the Court of Appeal did not decide this question.

In *Forster v. Baker* (f), BRAY, J., held that assignment of part of a debt was not within that sub-section.

(a) (1876), 34 L.T. 735; 3 Digest 175, 310.

(b) [1921] 3 K.B. 110; 21 Digest 639, 2188.

(c) See *Hughes v. Pump House Hotel Co.*, [1902] 2 K.B. 190; 8 Digest 444, 200.

(d) [1921] 1 Ch. 349; 8 Digest 428, 67.

(e) [1910] 2 K.B. 630; 8 Digest 428, 66.

(f) [1910] 2 K.B. 636; 8 Digest 428, 68.

In an Irish case, *Conlan v. Carlow County Council* (g), GIBSON and BOYD, JJ., concurred in this view of BRAY, J.

In *Durham Brothers v. Robertson* (h), and *Hughes v. Pump House Hotel Co.* (i), the point was raised in the Court of Appeal, but no decision given.

LAWRENCE, J., agreed with BRAY, J., that part of a debt was not assignable under the Judicature Act, so as to transfer the legal right in the assigned part to the assignee. He held, however, that such assignment operates in equity to transfer the part assigned and constitutes the assignee a creditor in equity of the debtor in respect of the part assigned. In such case the assignee could not make an effective demand for payment, and the assignor must be joined in any action. To the same effect is the decision in *Bank of Liverpool and Martins, Ltd. v. Holland* (j). The point was, however, considered by the Court of Appeal in *Williams v. Atlantic Assurance Co., Ltd.* (k). GREER, L.J., was the only member of the Court to express an opinion and he held that an assignee of part of a debt was merely an equitable assignee. If this is the case, then neither the 'payee' nor any transferee of an order for payment not being a cheque (such as a conditional order) can have any claim in law against the drawee banker in respect of that part of the drawer's current account balance which is represented by the order.

The Law of Property Act, 1925, s. 136 (l), puts equitable assignments on much the same footing as legal assignments. It provides that an absolute assignment in writing of any debt or chose in action, of which express notice in writing has been given to the debtor or other person from whom the assignor would have been entitled to claim, shall be effectual in law, subject to prior equities, to pass and transfer from the date of such notice (a) the legal right to such debt or thing in action, (b) all legal and other remedies for the same, (c) the power to give a good discharge for the same without the concurrence of the assignor.

It would thus seem that part only of a current account can not be effectually assigned at law.

As indicated in the summary by ATKIN, L.J., in the *Joachimson Case* (m), hereinbefore quoted, there are other questions arising out of the relationship of banker and customer, which will be dealt with under the appropriate headings.

(g) [1912] 2 I. R. 535 ; 8 Digest 428, 64 ff.

(h) [1898] 1 Q.B. 765 ; 8 Digest 443, 196.

(i) [1902] 2 K.B. 190, at p. 195 ; 8 Digest 444, 200.

(j) [1926], 43 T.L.R. 29 ; Digest Supp.

(k) [1933] 1 K.B. 81 ; Digest Supp.

(l) 15 Halsbury's Statutes 313.

(m) [1921] 3 K.B. 110 ; 21 Digest 639, 2188.

CHAPTER 4

THE CURRENT ACCOUNT

SUMMARY—

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It has been necessary to deal, to a certain extent, with the current account in discussing the altered position brought about by the judgment in *Joachimson v. Swiss Bank Corporation (a)*, particularly with reference to the limitation of actions, garnishee orders and assignments, and matters immediately affected thereby. There are, however, many other aspects in which it must be considered ; it is, despite the many mutual duties engrafted on the relation of banker and customer since 1848, the date of *Foley v. Hill (aa)*, still the predominant element in dealings between the parties.

SECTION 1.—HOW CURRENT ACCOUNT IS CONSTITUTED

The current account is made up of moneys paid in by the customer, of the proceeds of cheques and bills collected for him, of coupons collected, of interest and dividends paid direct to the banker by the customer's order, and from various other sources.

No distinction has, apparently, ever been drawn as to the status of moneys from such different sources, when once they have found their way into the current account ; they are treated as one entire debt, as if actually paid in in coin or notes by the customer.

The majority of accounts consist almost entirely of moneys thus received by the banker on account of the customer.

(a) [1921] 3 K.B. 110 ; 21 Digest 639, 2188.

(aa) (1848), 2 H.L. Cas. 28 ; 3 Digest 168, 272.

Technically, in such cases the banker's position is that of an agent, not a debtor ; the form of action would be money had and received, not debt. A claim for money had and received is invariably included in any action brought by the true owner against a banker who has collected a cheque for a customer having no title. That means waiving the tort and treating the banker as the plaintiff's agent ; collection for a fully entitled customer cannot differ in principle.

It would produce endless confusion and no good result to try and differentiate such items, and the implied agreement between banker and customer specified by ATKIN, L.J., in *Joachimson's Case* must be presumed, namely, that all moneys coming to the banker's hands for the credit of current account are to be taken as lent to the banker as soon as received.

SECTION 2.—GENERAL RULE NO FIDUCIARY RELATION

It is this purely debtor and creditor position which excludes any element or suggestion of trusteeship or fiduciary relation in the banker with regard to current account, the real point settled in *Foley v. Hill* (b).

The banker is free to use and does use the money as his own, like any other borrower ; the customer has parted with all control over it, like any other lender, retaining only his right to repayment.

And as a consequence the banker is not as a general rule concerned to inquire into the sources whence his customer derived the money, or to pay heed to the claims of third parties seeking to reach it in his hands as being by right theirs (c).

On this ground Courts have refused to interfere by injunction to restrain the banker from parting with moneys in his hands by honouring the customer's cheques, though such moneys were alleged to be the direct produce of a theft (d). In that case the customer was not before the Court, but KAY, L.J., intimated that, in any event, the only injunction they could make was one restraining the customer from drawing, not the bank from paying cheques previously drawn.

As shown hereafter, later decisions go to show that where all parties are before the Court and fraud or mistake of fact is proved, the relation of banker and customer will not of itself preclude the enforcement of repayment.

The older doctrine was supplemented or even over-shadowed

(b) (1848), 2 H.L. Cas. 28 ; 3 Digest 168, 272.

(c) Cf. *Bodenham v. Hoskins* (1852), 21 L.J. Ch. 864 ; 3 Digest 181, 339 ; *Thomson v. Clydesdale Bank, Ltd.*, [1893] A.C. 282 ; 3 Digest 188, 380, on the first point. *Calland v. Loyd* (1840), 6 M. & W. 26 ; 3 Digest 190, 389 ; *Gray v. Johnston* (1868), L.R. 3 H.L. 1 ; 3 Digest 186, 368, on the second, and see also *Shaw (John) (Rayner's Lane), Ltd. v. Lloyds Bank* (1945), "Journal of Institute of Bankers", vol. lxxi, p. 148.

(d) *Fontaine-Besson v. Parr's Banking Co. and Alliance Bank, Ltd.* (1895), 12 T.L.R. 121 ; 3 Digest 222, 580.

by another, namely, that once money had reached the hands of a banker or broker, it was absolutely merged, not traceable, and so not recoverable from the banker or broker, whatever might be the claimant's rights against the customer.

And, in a modified form, the same idea reappears in the doctrine of the appropriation of payments, by which earlier payments out are attributed to earlier payments in, thus possibly wiping out the impugned items (e).

It is obvious that these principles, if pushed to extremes, would work injustice.

The appropriation of payments system will, in its general bearing on the banker, be dealt with hereafter, but it may be noticed here that one of its injurious tendencies was neutralised in *Re Hallett's Estate*, *Knatchbull v. Hallett* (f), by the adoption of the charitable legal fiction that where a trustee or other person in a fiduciary capacity has paid trust money into his own private account, there is a presumption that moneys drawn out for his own use are drawn from his own rather than from the trust moneys, thus leaving any balance available to answer the trust divisible according to the rule in *Clayton's Case*, if the moneys of more than one person have been wrongfully so mixed with the private current account (g).

There was also the prerogative of the Crown in following Crown moneys into the hands of persons into whose hands they came. In its broadest aspect, as laid down by LORD LYNDEHURST in *R. v. Wrangham* (h), any such person becomes at once a debtor to the Crown in respect of such moneys, whether he knew it to be Crown money or not; but the rule, at any rate as regards bankers, is probably confined to cases where the banker knew or ought to have known that the money was in fact Crown money (j). In such cases the banker might even be liable to replace money already drawn out by the customer, unless the customer was authorised to pass the money to his private account (j).

SECTION 3.—FOLLOWING MONEY OF WRONGDOER OR PERSON IN FIDUCIARY CAPACITY

But now the doctrine of following or tracing money has developed on much broader lines.

So long as money is traceable either in specie or in its proceeds or investment, equity, or common law administering equity, will follow and lay hold of it, under what is known as a tracing order, for the benefit of the person who has been

(e) *Devaynes v. Noble*, *Clayton's Case* (1816), 1 Mer. 572; 3 Digest 179, 334.

(f) (1880), 13 Ch. D. 696; 3 Digest 185, 363.

(g) *Re Stenning*, *Wood v. Stenning*, [1895] 2 Ch. 433; 3 Digest 189, 385.

(h) (1831), 1 Cr. & J. 408; 16 Digest 222, 124.

(j) *Re West London Commercial Bank* (1888), 38 Ch. D. 364; 16 Digest 222, 121.

defrauded of it, parted with it under mistake of fact, or is otherwise rightfully entitled to it.

This procedure enables relief to be given in many cases where the narrower form of action for money had and received would fail. It is fully expounded by the House of Lords in *Sinclair v. Brougham* (k). Its operation is further exemplified and shown to affect money in the hands of a banker by *Banque Belge pour l'Etranger v. Hambrouck* (l). There a cheque had been obtained by fraud, the proceeds thereof subsequently transferred to a third person for no legal consideration, and by that person paid into a bank. The bank paid the money into Court, and the question was between the defrauded party and the transferee of the proceeds. The Court of Appeal, adopting the line laid down in *Sinclair v. Brougham*, held that the transferee could have no better title to the money than the fraudulent transferor had. They said there was no immunity for bankers, and that, if traceable, the money could have been followed into the bank. *Hallett's Case* was treated as only coming into play where the money was not traceable, because merged by virtue of *Clayton's Case* and the relationship of banker and customer, a sort of additional chance for the rightful claimant.

It is not the duty or interest of a banker to decide between conflicting claims to money in his hands: the course adopted in the above case, of obtaining the protection of the Court and leaving the interested parties to fight the matter out, is obviously the wise one to pursue.

Money paid by mistake

Where money is paid under a mistake of fact to the credit of a customer, the relation of banker and customer will not enable the banker to hold it against the person who paid it in, unless he received it as agent and has altered his position before he discovers or has notice of the mistake (m). Where a banker pays over as an agent, it is immaterial that he is under a misapprehension as to the identity of his principal (n). Merely putting money to reduction of an overdraft is not a sufficient alteration of position; making further advances on the strength of it probably would be (o). Lien does not apply. As BAILHACHE, J., said in *Scottish Metropolitan Assurance Co. v. Samuel (P.) & Co.* (p), lien only affects the customer's money, which is not money paid to his account by mistake of fact.

In the above-mentioned case of *Commissioners of the*

(k) [1914] A.C. 398; 3 Digest 159, 231.

(l) [1921] 1 K.B. 321; Digest Supp.

(m) *Commissioners of the Admiralty v. National Provincial and Union Bank of England, Ltd.* (1922), 127 L.T. 452; Digest Supp.

(n) *Gowers v. Lloyds and National Provincial Foreign Bank, Ltd.*, [1937] 3 All E.R. 55.

(o) Cf. *Kleinwort, Sons & Co. v. Dunlop Rubber Co.* (1907), 97 L.T. 263; 3 Digest 179, 333; *Kerrison v. Glyn, Mills, Currie & Co.* (1911), 81 L.J.K.B. 465; 3 Digest 170, 282.

(p) [1923] 1 K.B. 348; 29 Digest 301, 2470.

Admiralty v. National Provincial and Union Bank of England, Ltd., Joachimson v. Swiss Bank Corporation (q) had been cited for the defendants, but SARGEANT, J., said :

"The case of Joachimson has nothing to do with it. That only refers to the ordinary relation of banker and customer; the undertaking to honour cheques does not extend to amounts standing to the credit of current account if and so far as it was swollen by an inadvertent payment in mistake of fact."

In *Steam Saw Mills Co. v. Baring Brothers & Co.* (r), where it was claimed that money had been paid into the bank under mistake of fact, the Court of Appeal held that the bank was entitled to keep the money in its hands, but must undertake not to part with it without notice to the plaintiffs and without an order of the Court, the application having been made in the absence of the party mainly interested.

There are other circumstances in which moneys which have wrongfully found their way into the banker's hands may be reclaimed. There is money collected on cheques for a wrongful holder, dealt with hereafter under the head of "The Collecting Banker". There is the somewhat discrepant series of cases dealing with improper drawings on a trust account by which the banker has more or less directly profited.

A. TRUST ACCOUNTS

It is sometimes asserted that bankers can avoid having notice of trust accounts. That is not the case. It is not a question of whether or no the account is opened under a heading distinctly describing it as a trust account. Accounts headed, for distinguishing purposes, in terms not definitely indicating a trust, have been held proof that the banker was aware of the fiduciary nature of the account—for instance, in *Re Gross, Ex parte Kingston* (s), 'Police Account' was held to constitute an account so headed a trust account.

And, apart altogether from any question of heading, if the banker has notice, either from information or otherwise, that an account is affected with a trust, express or implied, that the customer is in possession or has control of the money in a fiduciary capacity, he must regard the account strictly in that light. Of course, where there is no such notice, the mere fact that, unknown to the banker, moneys are held by the customer in a fiduciary capacity in no way affects the banker's right to treat them as the absolute property of the customer (t). Nor is the

(q) [1921] 3 K.B. 110 ; 21 Digest 639, 2188.

(r) [1922] 1 Ch. 244 ; Digest Supp.

(s) (1871), 6 Ch. App. 632 ; 3 Digest 182, 347.

(t) *Thomson v Clydesdale Bank, Ltd.*, [1893] A.C. 282 ; 3 Digest 188, 380 ; *Union Bank of Australia, Ltd. v. Murray-Aynsley*, [1898] A.C. 693 ; 3 Digest 182, 348 ; *Bank of New South Wales v. Goulburn Valley Butter Co. Proprietary*, [1902] A.C. 543, P.C. ; 3 Digest 189, 387.

mere fact that the person opening the account occupies a position which renders it probable that he has moneys of other persons in his hands sufficient to put the banker on inquiry (*u*). Where, however, the customer holds any such position, the fact may lend added significance to the heading under which the account is opened.

When once the banker is fixed with the fiduciary nature of the account he has to bear in mind two somewhat conflicting influences. He has to consider the interests of the persons beneficially entitled, indirectly involving his own, and he has to recognise the right of his customer to draw cheques on the account and have them honoured. This divided duty has led to complications. The banker obviously must not be a party or privy to any fraud on the beneficiaries, any misapplication of the trust fund. He could not, on the mere instruction of the customer, transfer trust funds to private account, to wipe out or reduce an overdraft (*w*).

It is with the cheque that difficulties arise.

It is not the business or right of a banker, to whom a cheque is presented, to set up the claim of any third person against the mandate of his customer ; at the same time, he cannot shelter himself behind his character of banker to cover complicity in a fraud (*y*). Mere suspicion does not justify the banker in refusing payment of a cheque. The suggestion made in *Re Gross, Ex parte Adair* (*z*), that a banker would be acting rightly in dishonouring a cheque drawn by a customer on a trust account because it was payable to a person known to be that customer's tailor, is exaggerated, and is not supported by *Re Gross, Ex parte Kingston* (*a*), which was the appeal from that decision. The same applies to some of the statements in *Re Wall, Jackson v. Bristol and West of England Bank, Ltd.* (*b*).

On the stricter lines now obtaining with regard to dealing with trust funds, it might well be that a banker would be held liable for parting with the money to a third person, even on a cheque, if the circumstances were such that he must have known it was a misapplication of the funds, albeit no personal benefit accrued to the banker.

Solicitors' banking accounts are the subject of legislation in the Solicitors Act, 1933, and the Solicitors Act, 1941. Section 1 (*c*) of the former required the Council of the Law Society to

(*u*) *Greenwood Teale v. Williams (William), Brown & Co.* (1894), 11 T.L.R. 56; 3 Digest 189, 383 (a solicitor); *Thomson v. Clydesdale Bank, Ltd.*, *ubi supra* (a stockbroker).

(*w*) Cf. *John v. Dodwell & Co.*, [1918] A.C. 563; 43 Digest 535, 705.

(*y*) *Gray v. Johnston* (1868), L.R. 3 H.L. 1; 3 Digest 186, 368; approved in *John Shaw (Rayne's Lane), Ltd. v. Lloyds Bank, Ltd.* (1945), "Journal of Institute of Bankers", vol. lxvi, p. 148.

(*z*) (1871), 24 L.T. 198, at p. 203.

(*a*) (1871), 6 Ch. App. 632; 3 Digest 182, 347.

(*b*) (1885), 1 T.L.R. 522; 3 Digest 184, 352.

(*c*) 26 Halsbury's Statutes 736.

make rules "as to the opening and keeping by solicitors of accounts at banks for clients' moneys". The Solicitors' Accounts Rules, 1935, came into force on the 1st January 1935, and were amended on March 2, 1939, June 21, 1940, and May 14, 1941. These have now been superseded by the Solicitors' Accounts Rules, 1945. Moreover, a new set of rules, the Solicitors' Trust Accounts Rules, has now been drawn up in accordance with s. 18 of the Solicitors Act, 1941 (*cc*). In the wording of the Law Society, taken from an explanatory memorandum published in June, 1944, the broad effect of the combined new rules "is that money which is received by a solicitor and which does not belong to him :

- (a) must be dealt with through his client account, if he receives it in connection with his practice ;
- (b) must be dealt with through his client account or a separate trust bank account opened for the particular trust, if it is trust money subject to a trust of which the solicitor is sole trustee or co-trustee only with a partner, clerk or servant of his, or with more than one of such persons ;
- (c) may be dealt with through his client account, if it is subject to any other trust of which he is a trustee".

No. 4 of the Solicitors' Accounts Rules, 1945, specifies the moneys which may be paid into a client account, and No. 3, those which must be so credited.

Section 8 (1) of the 1933 Act (*d*) provides that a banker shall not, in respect of a transaction on the account of any solicitor, incur any liability, or be under any obligation to make inquiry, or be deemed to have any knowledge of any third party right in connection with such account, which the banker would not suffer in the case of the account of a person entitled absolutely to the money paid or credited to it—except such liability or obligation arising apart from the Act. Subsection 2 precludes the banker's claiming any recourse or right, such as by way of set-off, counter-claim, charge or otherwise, in respect of an account maintained by a solicitor for clients' moneys—except such recourse or right which existed when the rules came into operation.

It must be said that this adds little in clarification of the previously existing position of a banker *vis-à-vis* a solicitor customer.

It is submitted that there is nothing in either set of Rules which fundamentally affects the relationship between a banker and his solicitor client ; s. 8 of the 1933 Act still controls it. There can be no duty on a banker to see that the rules are

(cc) 34 Halsbury's Statutes 332.
L B.

(d) 26 Halsbury's Statutes 738.
E

complied with, and in the majority of cases he would not be in a position to judge the transaction ; Rule 7, which states what moneys may be drawn from a client account, shows clearly how impossible this would be. As regards moneys due from a client to the solicitor ; moneys due to the solicitor which he is entitled to split, but does not ; and moneys paid into a client account by accident or mistake, Rule 8 lays down that these may be recovered by cheque in favour of the solicitor or by transfer to an account in his name not being a client account. It is obvious that a client account should not be overdrawn.

As regards the Trust Accounts Rules, it is submitted that no higher duty is placed on a banker than that to which he is subject in connection with trust accounts generally ; and it would seem that the trustees may borrow on such accounts as ordinary trustees, either by virtue of the deed by which the trust is created or in accordance with the provisions of the Trustee Act, 1925.

B. BENEFIT TO BANKER

Cases have, however, arisen where the banker has occupied the dual capacity of drawee of a cheque on an account known to be a trust account and at the same time payee of the cheque for his own benefit, as in reduction of an overdraft on the private account of the customer.

Differing views

Decisions have somewhat varied as to the exact rule in such cases. In *Foxton v. Manchester and Liverpool District Banking Co. (e)*, FRY, J., laid down that a bank could not retain the benefit of a cheque drawn on a trust fund known to be such and paid into an overdrawn private account. He said :

" It appears to be plain that the bank could not derive the benefit which they did from that payment, knowing it to be drawn from a trust fund, unless they were prepared to show that the payment was a legitimate and proper one, having reference to the terms of the trust. It is said that they did not know what the trust was at that time. That appears to me to be immaterial, because those who know that a fund is a trust fund cannot take possession of that fund for their private benefit, except at the risk of being liable to refund it in the event of the trust being broken by the payment of the money."

In *Coleman v. Bucks and Oxon Union Bank (f)*, BYRNE, J., carefully reviews this case in the light of *Gray v. Johnston (g)*. He quotes (h) significant passages from that case, in which LORD CAIRNS and LORD WESTBURY distinctly imply that the banker is not to be held privy to the fraud merely because, in the ordinary course of business, the cheque was carried to the private account and diminished an overdraft which, if a balance had been struck, would have been found to exist ; but that to

(e) (1881), 44 L.T. 406 ; 3 Digest 183, 351.

(f) [1897] 2 Ch. 243 ; 3 Digest 182, 344.

(g) (1868), L.R. 3 H.L. 1 ; 3 Digest 186, 368.

(h) See pp. 248-249.

deprive the banker of the benefit, it must be one "designed or stipulated for", as, for instance, where a balance has been struck and the customer pressed for payment or reduction of the ascertained overdraft on the private account. With regard to *Foxton's Case*, he says :

"That was a case depending on the evidence. I need not go into all the circumstances, but there was a benefit designed for the bank, who had been calling on the parties having private accounts to reduce their overdrafts, and they did it with the intention of reducing their indebtedness."

He then quotes the remarks of FRY, J., reproduced above, and continues (j) :

"I am asked to say that that amounts to a decision to this effect: that wherever there is an account which upon the face of it is a trust account, and the customer draws a cheque upon that account and pays in the cheque to the credit of his private account, the bankers are bound to see and inquire (that is how I understand the proposition is put) that the customer is in point of fact entitled to the money which he so transfers from one account to another. I do not think that that was the meaning of the learned judge in that case. If bankers have the slightest knowledge or reasonable suspicion that the money is being applied to breach of a trust, and if they are going to derive a benefit from the transfer and intend and design that they should derive a benefit from it, then I think the bankers would not be entitled to honour the cheque drawn upon the trust account without some further inquiry into the matter."

But he held that the fact that in point of law the money must, in the case before him, be regarded as having been applied at the moment in reduction of an overdraft, did not render the bankers liable to refund it, although they knew the money was derived from some trust.

In *A.-G. v. De Winton (k)*, FARWELL, J., expressed approval of the view taken by FRY, J. There is, therefore, a predominance of opinion in favour of the stricter rule laid down by FRY, J.

And subsequent decisions, though not directly apposite on the facts, bring out strongly that tendency, before referred to, to look with very jealous eyes on any dealing with trust funds whereby one of the parties to such dealing reaps a benefit.

In *John v. Dodwell & Co. (l)*, the respondents' manager was authorised to draw cheques upon their account for the purposes of the business. He bought shares through the appellants as brokers, and, in payment of the price, fraudulently gave cheques upon the respondents' account. The appellants received such cheques without fraud, but with knowledge that the manager, without apparent authority, was drawing for his own purposes upon the respondents' funds. The respondents were held entitled to recover the money as money held in trust for them, on the grounds, first, that on the face of them the cheques showed that the agent was, without showing authority to do so,

(j) p. 253.

(k) [1906] 2 Ch. 106 ; 33 Digest 77, 497

(l) [1918] A.C. 563 ; 43 Digest 535, 705.

drawing cheques for his own purposes on the respondents' funds at their bankers, and that deprived the appellants of any right to hold them against the respondents ; second, that the agent was in a fiduciary position, and any third person taking from the agent a transfer of the property, with knowledge of the breach committed by him in making the transfer, held what had been transferred under a transmitted fiduciary obligation to account for it to the principal.

In *British America Elevator Co. v. Bank of British North America (m)*, a bank agreed to furnish the company's agent with cash in exchange for drafts on the company. The cash, as the bank knew, was to be used in paying for grain to be purchased for the company by the agent. The bank, instead of giving cash for the drafts, credited them in whole or in part to the agent's private account, which was generally overdrawn. Held, by the Judicial Committee of the Privy Council, that the bank having been party to a misapplication of trust funds, the company was entitled to judgment for the amount of the loss : in other words, that the bank, having knowingly been parties to a misapplication of trust funds, were liable to replace those funds. *John v. Dodwell & Co., ubi supra*, was followed and made the ground of decision in *Reckitt v. Barnett, Pembroke and Slater, Ltd. (n)*, the case of an agent purchasing a motor car for himself with his principal's money. According to LORD ATKIN, this case did not differ in principle from *Midland Bank, Ltd. v. Reckitt (o)*, which was based on the receipt by the bank, in reduction of the overdraft of Lord Terrington, of a cheque drawn by Terrington as attorney for Sir Harold Reckitt.

It may be contended that none of these cases was that of a banker faced with the problem of a cheque drawn on him and directed to be paid into private account. That is true, but one cannot help feeling that, in their light, a Court might very possibly regard the duty to honour such cheque, when destined for an overdrawn private account, as a duty of minor obligation. In the author's opinion, the course dictated by expediency, if by no higher motive, is for a banker scrupulously to abstain from being party or privy to any operation on an account known to be a trust account, involving benefit to the banker, even indirect and unasked for, through the medium of overdrawn private account or otherwise, and whether or no a cheque is concerned.

SECTION 4.—COMBINING ACCOUNTS

It is clear that knowledge of the fiduciary nature of an account, however acquired, will preclude the banker from himself utilising the account for his own benefit, as by combining

(m) [1919] A.C. 658 ; Digest Supp.

(n) [1929] A.C. 176 ; Digest Supp.

(o) [1933] A.C. 1 ; Digest Supp.

it with the customer's private account or asserting a lien over it for the customer's personal liabilities.

Where, however, the customer has two accounts in his own name, one a purely private one, the other suggesting that someone else may be interested in it, e.g., 'A. B. account C. D.' or 'A. B. re C. D.,' it would seem that a balance on the purely private account could be utilised to cover a debit on the other (p).

When there is no question of fiduciary relation or trust account involved with regard to any of several accounts kept by a customer, the bank can combine them, unless by agreement, earmarking, course of business or the like there is an obligation to keep them separate. Even then, the obligation is terminable by reasonable notice (q). On this question the views of the Institute of Bankers, based on *Greenhalgh (W. P.) & Sons v. Union Bank of Manchester* (qq), are of interest (post, p. 379).

But such combination should always be exercised with due care for the customer's credit and interests, the dishonour of outstanding cheques, in particular, being avoided if in any way possible.

In some circumstances the banker is bound to combine. Thus, where a bank has a loan account and also a current account in credit with the same customer, and holds security for the ultimate balance, in the sense that, in the words of LINDLEY, M.R., at p. 85: "... there was no agreement to the effect that the deposited bonds should be a security for anything except that which, on taking an account between Tatham & Co. and the bankers, under all heads of account between them, should ultimately be found due . . ." (r), it cannot appropriate the proceeds of the security to the loan account, ignoring the credit balance on the other, but must treat the two as one account (rr).

The customer has not the corresponding right to combine accounts kept at different branches, so as to draw cheques indiscriminately (s).

Apart from combining, the bank is not entitled to close a customer's account without due notice. This is laid down by ATKIN, L.J., in the summary of the mutual obligations above

(p) Cf. *Coutts & Co. v. Irish Exhibition in London* (1891), 7 T.L.R. 313; 3 Digest 263, 799.

(q) *Re European Bank, Agra Bank Claim* (1872), 8 Ch. App. 41, at p. 44; 3 Digest 171, 290; *Garnett v. McKewan* (1872), L.R. 8 Exch. 10; 3 Digest 222, 574; *Buckingham & Co. v. London and Midland Bank, Ltd.* (1895), 12 T.L.R. 70; 3 Digest 218, 554; *Union Bank of Australia, Ltd. v. Murray-Aynsley*, [1898] A.C. 693; 3 Digest 182, 348.

(qq) [1924] 2 K.B. 153; Digest Supp.

(r) There was no agreement that the accounts should be kept separate.

(rr) *Mutton v. Pear*, [1900] 2 Ch. 79; 3 Digest 272, 848.

(s) *Woodland v. Fear* (1857), 7 E. & B. 519; 3 Digest 217, 548; *Garnett v. McKewan* (1872), L.R. 8 Exch. 10; 3 Digest 222, 574; *McNaughten v. Cox & Co.* (1921), Times, May 11, where the two branches were in one building; and the summary of the obligations of banker and customer by ATKIN, L.J., in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K.B. 110; 21 Digest 639, 2188.

referred to (t). As to what constitutes due notice, see *Prosperity, Ltd. v. Lloyds Bank, Ltd.* (u). The banker must provide for outstanding cheques. It is not sufficient to request the customer to transfer his credit balance to another bank, and undertake to refer cheques to that bank, because that involves technical dishonour.

SECTION 5.—BANKRUPTCY OF CUSTOMER

The position of the banker when his customer becomes bankrupt is, owing to defective legislation, partly dubious ; where clear, unreasonably to the banker's prejudice. To begin with, the Bankruptcy Act, 1914, s. 38 (w), defines as property divisible among the creditors all property belonging to or vested in the bankrupt at the commencement of the bankruptcy or acquired by or devolving on him before discharge. Property includes choses in action, and a current account, of course, is within this section. The banker must hand over to the trustee in bankruptcy all assets of the bankrupt held by him which he is not entitled to retain. No demand seems necessary, and if the banker does not do so, he becomes guilty of contempt of Court (y).

As against this, the banker has the full right of satisfying any set-off, lien or other claim he may have against such assets, including the right to safeguard himself with regard to current bills discounted for the bankrupt or on which the bankrupt is liable as acceptor (z).

If matters stopped there, the banker would have no just cause of complaint. But he has to reckon with the legislation as to relation back of the trustee's title, and see how far his ordinary transactions with the customer during the period covered by such relation back are validated by falling within the prescribed protected transactions.

A. RELATION BACK

The commencement of the bankruptcy, on which the property of the bankrupt vests in the trustee, is not, as might be supposed, the adjudication in bankruptcy, or even the receiving order. It is an arbitrary point of time. By s. 37 of the Bankruptcy Act, 1914 (a), the bankruptcy relates back to the act of bankruptcy on which the receiving order is made against the bankrupt, or, if the bankrupt is proved to have committed

(t) See also *Buckingham & Co. v. London and Midland Bank, Ltd.* (1895), 12 T.L.R. 70 ; 3 Digest 218, 554.

(u) (1923), 39 T.L.R. 372 ; Digest Supp.

(w) 1 Halsbury's Statutes 643.

(y) *Ibid.*, s. 48 ; 1 Halsbury's Statutes 652.

(z) *Baker v. Lloyds Bank, Ltd.*, [1920] 2 K.B. 322 ; Digest Supp.

(a) 1 Halsbury's Statutes 642.

more acts of bankruptcy than one, to the time of the first of such acts within three months before presentation of the petition.

It would seem that the commencement of the bankruptcy is to be fixed, not merely by the day, but at the actual moment when the act of bankruptcy on which the petition is founded was committed (*b*). The receiving order, on the other hand, is in law deemed to have been made on the first moment of the day of its date, so that it covers all payments made that day (*c*).

The cases in which the banker gets to know of an act of bankruptcy on the part of his customer are necessarily rare ; less so, of a petition against him. He was sometimes kept in the dark as to a receiving order having been made until after he had, by paying the customer's cheques, incurred further liabilities to the trustee, but this position has been eased, as is shown later, by the amending Act of 1926, s. 4 (*d*).

Indeed, notice of an act of bankruptcy or a petition is treated by the parent Act rather in the light of a bar to protection than as having any direct effect. For transactions after the making of the receiving order there is no protection whatever, except with regard to after-acquired property.

The provisions as to protected transactions are contained in ss. 45 and 46 of the Bankruptcy Act, 1914 (*e*) ; in s. 47 (*f*) as to after-acquired property ; and the trouble is that, except in the case of s. 47, the wording seems almost designed to exclude the case of the banker paying to third persons cheques drawn by the bankrupt.

Section 45 reads :

“ Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements, assignments and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy—

- (a) Any payment by the bankrupt to any of his creditors ;
- (b) Any payment or delivery to the bankrupt ;
- (c) Any conveyance or assignment by the bankrupt for valuable consideration ;
- (d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration :

Provided that both the following conditions are complied with, namely—

- (i) that the payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order ; and
- (ii) that the person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment,

(b) *Re Bumpus, Ex parte White*, [1908] 2 K.B. 330 ; 5 Digest 646, 5794.

(c) *Re Pollard, Ex parte Pollard*, [1903] 2 K.B. 41, at p. 45 ; 5 Digest 815, 6933.

(e) 1 Halsbury's Statutes 650, 651.

(d) 1 Halsbury's Statutes 716.
(f) 1 Halsbury's Statutes 651.

contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time."

Under s. 45, therefore, transactions to be protected must take place before receiving order, and the person concerned must not have at the time notice of any available act of bankruptcy. Then come the class of dealings protected, the only ones possibly touching the position being payment or delivery to the bankrupt, and contract, dealing, or transaction by or with the bankrupt for valuable consideration.

Paying cheques of bankrupt

On the face of it, these words are eminently unfitted to cover the case of a banker paying away the bankrupt's money, on his cheques, to third persons. That is not payment or delivery to the bankrupt, nor is it a contract, dealing, or transaction by or with him for valuable consideration (g).

But with regard to this s. 45, the strongest argument that it does not cover the case is to be found in the special provision in s. 47 (1) dealing with after-acquired property, which enacts that :

"for the purposes of this sub-section any payment and any delivery of any security or negotiable instrument made to or by the order or direction of a bankrupt by his banker *shall be deemed* to be a transaction by the bankrupt with such banker dealing with him for value."

By every canon of statute interpretation this is conclusive that such payment is not such a transaction for the purpose of any preceding section ; "*shall be deemed*" shows that the construction to be applied to s. 47 is an unnatural and fictitious one, and implies that in any other connection such construction is unjustifiable.

Section 46 is apparently intended to cover somewhat broader ground than s. 45. It provides that :

"payment of money or delivery of property to a person subsequently adjudicated bankrupt or to a person claiming by assignment from him shall, notwithstanding anything in this Act, be a good discharge if made before the actual date on which the receiving order is made and without notice of the presentation of a bankruptcy petition, and is either pursuant to ordinary course of business or otherwise *bona fide*."

Here there is a concession. The protected period is enlarged. With regard to payments of money or delivery of goods, notice of an act of bankruptcy is not to count ; a man might have notice of an available act of bankruptcy but not of a petition having been presented, and if in the ordinary course of business or otherwise *bona fide* he paid money or delivered property to which the bankrupt was entitled, either to the bankrupt or his assignee, it would be a good discharge, despite

(g) Cf. *Re Clark, Ex parte Beardmore*, [1894] 2 Q.B. 393 ; 5 Digest 736, 6366 ; *Re Teale, Ex parte Blackburn*, [1912] 2 K.B. 367 ; better reported, 19 Mans. 327 ; 4 Digest 168, 1571.

the subsequent bankruptcy adjudication, and the trustee could not claim it again.

Section 46 is really inconsistent with s. 45. Both sections deal with payment or delivery to a bankrupt, for a person subsequently adjudicated bankrupt is a bankrupt. Section 45 implies that such payment or delivery is bad if made with notice of an act of bankruptcy, s. 46 that it is good. But s. 46 says, "notwithstanding anything in this Act", so it overrides s. 45, for it cannot be contended that notice of an act of bankruptcy makes the payment or delivery *mala fide*. One cannot help suspecting that s. 46 was introduced to meet some exceptional case, say that of bankers, who were notoriously agitating on the subject; that it somehow got made general and so inconsistent with s. 45, and, incidentally, failed in its object.

For here again the language of s. 46 is absolutely inappropriate to the case of a banker paying a cheque to a third party holder. Payment of a cheque to a third party payee or a subsequent holder is not payment to the drawer. And a cheque is not an assignment of money in the hands of the drawee, nor is the holder of such cheque an assignee of such money or entitled to claim it as such.

Williams on Bankruptcy, 15th (1937) ed., p. 354, says: ". . . it seems that the payee of a cheque drawn by the bankrupt is not within these latter words", and quotes *Hopkinson v. Forster* (h), and *Schroeder v. Central Bank of London, Ltd.* (j).

But there can be no question about it. The Bills of Exchange Act, 1882, s. 53 (k), says, "A bill of itself does not operate as an assignment of funds in the hands of the drawee available for the payment thereof"; s. 73 (l) says, "A cheque is a bill of exchange drawn on a banker payable on demand". *Quære* the case of a conditional order on a banker? It would seem that this would fall within s. 46.

And the holder of a cheque has no claim whatever on the banker. His only claim, if the cheque is dishonoured, is against drawer and prior indorsers.

This view does not need any support from the language of s. 47 (m), otherwise it might be pointed out that when that section, for the purpose of saving the payment of a cheque on after-acquired funds, utilises s. 45, it implies that s. 46 is not available or applicable.

Result of the sections

The position, which does not appear to be on any rational basis, works out thus:

A man, having committed an act of bankruptcy and having

(h) (1874), L.R. 19 Eq. 74; 3 Digest 221, 572.

(j) (1876), 34 L.T. 735; 3 Digest 175, 310.

(k) 2 Halsbury's Statutes 63. (l) 2 Halsbury's Statutes 73.

(m) Bankruptcy Act, 1914; 1 Halsbury's Statutes 651.

a petition against him pending, draws a cheque payable to himself. He presents it to his bankers, who know of the act of bankruptcy but not of the petition. They pay him in the ordinary course of business. He is subsequently adjudicated bankrupt. They are protected under s. 46, even if he draw out his full credit balance.

A man who has committed an available act of bankruptcy draws a cheque payable to a third party. The payee presents it to the banker, who has no notice of the act of bankruptcy. The banker pays it. A receiving order is subsequently made on that act of bankruptcy. The bank are liable to the trustee for the money paid out, not being protected by s. 45, sub-s. (d) of the Bankruptcy Act, 1914 (*n*).

Where notice of an act of bankruptcy operates to exclude protection, such notice need not be express or precise :

"When an act of bankruptcy has in fact been committed, any communication which brings to the knowledge of a person the alleged fact that an act of bankruptcy has been committed in any way which ought to induce him as a reasonable man to believe that the notification is true is sufficient notice." (*p*)

Notice of a petition is constructive notice of the act of bankruptcy therein alleged (*q*), unless, perhaps, the petition is dismissed (*r*).

Collecting cheques

So far as the collection of cheques is concerned, neither s. 45 nor s. 46 protects a banker collecting cheques for a customer whom he knows to have committed an act of bankruptcy. The subsequent payment out of the proceeds of those cheques is also unprotected, for s. 45 cannot have any application to funds which are already the subject of conversion as against a trustee. In practice a banker should agree to collect only on the condition that payment is not demanded until the position has clarified and the debtor is free to make the demand without prejudicing the banker's position.

B. AFTER-ACQUIRED PROPERTY

Although the Bankruptcy Act, 1914, in general contemplates and provides for the vesting in the trustee of all property acquired by or devolving on the bankrupt prior to his discharge, a certain amount of latitude has always been allowed with regard to after-acquired property, and the rule, as formulated in *Cohen v. Mitchell* (*s*), was adopted, until 1914, that :

(*n*) 1 Halsbury's Statutes 650.

(*p*) Cf. *Hope v. Meek* (1855), 10 Exch. 829 ; 5 Digest 919, 7518.

(*q*) *Re Gershon and Levy, Ex parte Coote and Richards, Ex parte Westcott & Sons*, [1915] 2 K.B. 527 ; 5 Digest 922, 7545.

(*r*) *Per* LINDLEY, L.J., in *Re O'Shea's Settlement, Courage v. O'Shea*, [1895] 1 Ch. 325, at p. 332 ; 5 Digest 925, 7573.

(*s*) (1890), 25 Q.B.D. 262 ; 5 Digest 729, 6324.

“until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee.”

Section 47, sub-s. 1, of the Bankruptcy Act, 1914 (*r*), based on this rule, enacts as follows :

“All transactions by a bankrupt with any person dealing with him *bona fide* and for value in respect of property, whether real or personal, acquired by the bankrupt after the adjudication shall, if completed before the intervention of the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in that trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction.”

As before stated, it then puts payment by a banker of a cheque drawn, by an undischarged bankrupt customer, to the payee or holder out of after-acquired property on the footing of a protected transaction for value with the bankrupt himself. The payment of the bankrupt's cheque to a third party is unquestionably “a payment made by order or direction of the bankrupt by his banker”, it being now firmly established by the judgment of the House of Lords in *London Joint Stock Bank, Ltd. v. Macmillan and Arthur* (*u*), that, so far as cheques are concerned, the relation of customer and banker is that of mandant and mandatory : he who orders and he who has to obey.

Conversely, with regard to after-acquired property, s. 47 (1) provides that for the purposes of the sub-section the receipt of any money, security or negotiable instrument from or by the order or direction of the bankrupt by his banker shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value. This covers the opening of an account by the undischarged bankrupt and all payments in to such account of after-acquired property.

It will be noticed that the 1914 legislation cuts out the part of the *Cohen v. Mitchell* rule which validated the transaction whether the party dealing with the bankrupt knew of the adjudication or not. Is the effect still the same? It might fairly be argued that the omission of any such words as “without notice that he is such undischarged bankrupt”, analogous to those relating to acts of bankruptcy in the preceding sections, implies that the rule holds good and that knowledge is immaterial. *Williams on Bankruptcy*, 15th (1937) ed. p. 358, submits that s. 47 (1) has not altered the law laid down in *Cohen v. Mitchell* (*w*), though it omits “with or without knowledge of bankruptcy”, quoting SWINFEN EADY, M.R., in *Hosack v. Robins* (*y*), where he says, “Section 47 of the Act of 1914 was,

(*r*) 1 Halsbury's Statutes 651.

(*u*) [1918] A.C. 777 ; 3 Digest 233, 644.

(*w*) (1890), 25 Q.B.D. 262 ; 5 Digest 729, 6324.

(*y*) [1918] 2 Ch. 339, at p. 345 ; 5 Digest 731, 6334.

however, a statutory recognition and embodiment of the law previously laid down in *Cohen v. Mitchell*”.

But the question is not of much practical importance to the banker : he is made the subject of special legislation.

Section 47 (2) enacts as follows :

“ When the banker has ascertained that a person having an account is an undischarged bankrupt, unless satisfied that the account is on behalf of some other person it shall be his duty to inform the trustee or the Board of Trade, and thereafter he shall not make any payment out of the account except under order of the Court or instructions from the trustee, unless by the expiration of one month from such notice he has received no instructions from the trustee.”

The actual protection to the banker, therefore, is :

- (1) when he does not know the customer to be an undischarged bankrupt and his only dealings with him or at his direction or order are in respect of after-acquired property ;
- (2) where, having discovered the customer to be an undischarged bankrupt, he has given the requisite notice, suspended operations for a month, and then had no communication from the trustee. He can then begin again to deal with after-acquired property.

There is no suggestion how the banker is to recognise a new customer as an undischarged bankrupt of possibly a year's standing, or how he is to diagnose property as being after-acquired. The adoption of No. 2 does not cover previous transactions, which must stand or fall by the test of No. 1.

Looking at the unfortunate inference to be drawn from this special provision as to bankers in s. 47 in its bearings on ss. 45 and 46, these provisions of the Act of 1914 seem calculated to do bankers more harm than good, while the after-acquired property scheme appears scarcely calculated to afford the undischarged bankrupt those banking facilities which are essential for his business rehabilitation.

A possible course would be for the bankrupt to open an account with a nominal amount of after-acquired property, informing the banker of his position. The banker would communicate with the trustee, and some arrangement might be come to, or, if the trustee remained quiescent for a month, operations might proceed on a larger scale.

If customer demands payment

Prior to the Bankruptcy Act, 1914, when a banker was not safe in handing over property to a man whom he knew to have committed an available act of bankruptcy, he might be put in a difficult position by that man's demanding and suing for payment of a credit balance on current account. It was laid down in *McCarthy v. Capital and Counties Bank* (2), that if the customer

proceeds to action, the bank could bring the money into Court and thus secure protection and escape incurring costs. It is doubtful whether this procedure is available now ; at any rate, payment to the customer would now seem to be protected by s. 46 of the Act of 1914.

A customer applies for payment out of his credit balance or presents a cheque payable to himself for the amount. The banker knows of an available act of bankruptcy, but has no notice of the presentation of any petition, and does not know of any receiving order. The banker says, "Under s. 45 I cannot pay you, because I have notice of an available act of bankruptcy". The customer says, "Yes, but under s. 46 you get a good discharge if you pay me because you have no notice of any petition and you do not allege there is a receiving order against me. So you must pay me." It is hardly open to the banker to reply that to pay the man his own money would, in the circumstances, be contrary to the ordinary course of business.

If the customer's view is the right one, the banker would seem to have no alternative but to pay, and no ground for asking the protection of the Court, though if it turned out that a receiving order had been made covering the time of payment, he would have to refund the money to the trustee.

So again with a secured debt. In *Ponsford, Baker & Co. v. Union of London and Smith's Bank, Ltd.* (a), it was held that a banker was not entitled to receive payment of his secured debt and hand over the securities after notice of an act of bankruptcy on the part of the customer ; not as any limitation of the creditor's rights and powers to deal with the securities, but as a consequence of the debtor's having incapacitated himself from tendering the money.

If this is taken to fall within s. 45, this case holds good, because the banker has notice of an act of bankruptcy. If it falls within s. 46, as a payment of money or delivery of property, the position is the same as that defined above.

In face of such ambiguous legislation it is difficult to determine the point ; the balance is in favour of s. 46 being the ruling factor. And apparently that is the view taken by the authorities on Bankruptcy. *Williams*, 15th (1937) ed. p. 354, after dealing with the above-mentioned cases of *McCarthy v. Capital and Counties Bank* and *Ponsford, Baker & Co. v. Union of London and Smith's Bank, Ltd.*, goes on to say : "But now by s. 46 there must be notice of the presentation of a bankruptcy petition and not merely of an act of bankruptcy". *Chalmers and Hough on Bankruptcy*, 8th ed., at p. 128, say s. 46 removes the difficulty arising in cases such as *Ponsford, Baker & Co. v. Union of London and Smith's Bank, Ltd.*, implying that the banker would be safe in paying in such cases and not constrained or even entitled to seek the protection of the Court.

(a) [1906] 2 Ch. 444 ; 5 Digest 641, 5760.

Orders for payment

A peculiar feature is that though cheques are debarred from the operation of s. 46 as not being payments of money to a person claiming by assignment from the bankrupt, payment on any of the anomalous documents drawn on bankers, such as orders for payment with receipt attached, would probably come within that section as being payment to a person claiming by assignment from the bankrupt. The section draws no distinction between legal and equitable assignment, and s. 136 of the Law of Property Act, 1925 (*b*), places both on the same footing. Sir Mackenzie Chalmers has pointed out (*c*) that instruments not valid as cheques or bills may be operative as equitable assignments. An equitable assignment may be as to part of a fund and no particular form of words is necessary. Indorsement and gift of a non-transferable deposit receipt has been held a good equitable assignment of the moneys deposited (*d*).

Even if the assignee of part could not make an effective demand as such, there is an order emanating from the customer, and the assignee is "a person claiming by assignment from the bankrupt", which is sufficient to cover the payment, and this is a preferential treatment, as against the far more common and important cheque, which it is difficult to justify.

C. POSTPONED ADVERTISEMENT OF RECEIVING ORDER

An unjustifiable pitfall for the banker in connection with the bankruptcy of a customer remains as yet only partially remedied, though it seems to be the fact that in practice little trouble is experienced.

A practice has grown up by which, when a receiving order is made, the Court suspends the publication or advertisement of the receiving order for varying periods, presumably on the application and in the interest of the insolvent person, and notwithstanding that the Act requires it to be published forthwith.

As pointed out by the British Bankers' Association to the Government in May 1921, either from this cause or from mere delay in publication of the receiving order, a large proportion of the receiving orders made every week do not appear in the *Gazette* for a considerable time after they are actually made. A case was cited in which an interval of twenty-seven days elapsed. One instance of this occurred where an appeal in the Cause List for the term commencing 13th January 1930 referred to a receiving order made 28th November 1929, of which advertisement was suspended.

(*b*) 15 Halsbury's Statutes 313.

(*c*) *Bills of Exchange*, 10th ed., p. 16.

(*d*) *Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408; 3 Digest 194, 409.

When the trustee is appointed, of course all transactions with the bankrupt since the date of the receiving order fall through, and all property to which the bankrupt was entitled at the date of the available act of bankruptcy vests in the trustee, unless protected. For transactions after the date of receiving order there is no protection whatever ; it is not a question of notice or no notice, as with dealings prior to receiving order, but the vesting is absolute as from the date of the order.

The banker has been arbitrarily deprived of the ordinary prescribed warning through the medium of the *Gazette* that his customer has had a receiving order made against him, and he naturally goes on paying that customer's cheques, a facility of which the customer, in the circumstances, is likely to avail himself to the fullest extent, pending publication of the fact that the receiving order has been made.

The customer's credit balance vests in the trustee as from the act of bankruptcy ; no protection of any sort can be set up for any transaction after 12 midnight separating the day on which the receiving order was made from the preceding day.

The trustee is entitled to claim from the banker every penny he has paid away since that midnight. A case actually occurred where such claim was made on the morning of the day the order was made.

Naturally, this position did not go unchallenged. In *Re Wigzell, Ex parte Hart (e)*, the question arose in concrete form : A receiving order was made against the debtor, but advertisement thereof was postponed and all proceedings stayed. During such postponement and stay the insolvent debtor's bankers received £165 to his credit and paid out £195 on his cheques, in complete ignorance of the receiving order having been made, and of any available act of bankruptcy.

The County Court Judge, the Divisional Court and the Court of Appeal held that the banker was liable to the trustee subsequently appointed for the £165 without any allowance for the £195.

Various authorities were cited for the bank, such as *Re Thelluson, Ex parte Abdy (f)*, where, in the Court of Appeal, WARRINGTON, L.J., said :

"The question in this appeal is whether the circumstances of the case justify the exercise by the Court of the jurisdiction it has often exercised of directing its officer, in this case a trustee in bankruptcy, to pursue a line of conduct which an honest man, actuated by motives of morality and justice, would pursue, although not compelled thereto by legal process."

So in *Re Tyler, Ex parte Official Receiver (g)*, FARWELL, L.J., expressed the same doctrine in even more forcible language :

"As I understand the principle laid down in the case to which my

(e) [1921] 2 K.B. 835 ; Digest Supp.

(f) [1919] 2 K.B. 735 ; 4 Digest 205, 1893.

(g) [1907] 1 K.B. 865 ; 4 Digest 206, 1895.

Lord has referred, it comes to this: that the officer of the Court is bound to be even more straightforward and honest than an ordinary person is in the affairs of everyday life. It would be insufferable for this Court to have it said of it that it has been guilty, by its officer, of a dirty trick."

And even in this late case of *Re Wigzell, Ex parte Hart (h)*, the soundness of the principle was not disputed. LORD STERNDALE, M.R., said :

"It seems to me to have been established practically that there must be read into s. 45 of the Bankruptcy Act, 1914 (*j*), after the second proviso, a third proviso, 'Provided that the transaction, whenever it takes place, is one which it would not be honourable or high-minded for a trustee to impeach'."

The trouble was that the Court did not see their way to apply the principle to the case in point. One of two innocent parties had to suffer ; if the banker did not, the creditors would. It was not the trustee's fault, the publication was delayed on the debtor's behest and behalf, not the trustee's. No doubt the Court, in the person of the registrar, granted the temporary suppression of the fact of the receiving order, and the Court, in the person of its officer, the trustee, was reaping, for the creditors, the benefit of the postponement. But that did not make it a dirty trick on the part of the trustee, or, apparently, of the Court.

But the real ground was that the trustee was not in a position to exercise high-mindedness, and that there was no breach of high-mindedness in what he did, because he was merely doing what, by the Bankruptcy Act, 1914, he was bound to do, namely, get in for the benefit of the creditors whatever the Act embraces as the property of the debtor.

LORD STERNDALE, M.R., says, at p. 856 :

"It has been said that bankruptcy is the creation of statute, and that the decisions of the Courts have added fair-mindedness and high-mindedness to the actual words of the Act of Parliament, but this, to my mind, is asking us to give a protection which can only be given by the Legislature, and it is for the Legislature to consider whether or not it will give it (*k*)."

In *Re Wigzell, Ex parte Hart*, YOUNGER, L.J., suggested that the banker might be entitled to stand in the shoes of persons paid by such cheques and so prove in the bankruptcy. This would, in most cases, be an inadequate remedy, and is inapplicable in cases where the bankrupt has drawn out the money himself. *Re Wigzell* was distinguished in *Re Wilson, Ex parte Salaman (l)*, where it was held that the bankrupt must act properly and that the trustee is not entitled to reap the profit and at the same time repudiate the expenditure but for which the profit would not have been made.

(h) [1921] 2 K.B. 835 ; Digest Supp.

(j) 1 Halsbury's Statutes 650.

(k) *Scranton's Trustee v. Pearce*, [1922] 2 Ch. 87 ; Digest Supp.

(l) [1926] Ch. 21 ; Digest Supp.

A certain measure of relief has been accorded by the Bankruptcy (Amendment) Act, 1926, s. 4 (*m*), the effect of which briefly is that if the banker proves that he had no notice of the receiving order and it had not been gazetted at the time he paid, the trustee can only recover against him where and in so far as the Court is satisfied that it is not reasonably practicable to recover in respect of the money or some part thereof from the person to whom it was paid. This at least puts the trustee at the disadvantage of the attacking party, but the burden it lays upon him should not be difficult to discharge. At the same time, there is good authority for saying that banks no longer suffer loss from the postponed advertisement of receiving orders; which tends to show that where payment is unwittingly made after the making of a receiving order, the trustee is successful in any application he makes to the payees for reimbursement.

D. FRAUDULENT PREFERENCE

Section 44 of the Act of 1914 (*n*) was designed to protect the general body of creditors against the preferring of any particular creditor. It differed from earlier statutes in that it incorporated words intended to invalidate a conveyance or transfer of property or charge thereon, a payment made or obligation incurred, and every judicial proceeding taken or suffered by a person unable to pay his debts as they become due, with a view to preferring a creditor, "or any surety or guarantor for the debt due to such creditor". Interpretation of this section by the Courts has, unfortunately, not been uniform. In *Re Stanley (G.) & Co. (o)*, a payment to the debtor's bankers released the guarantor, and the liquidator tried to recover from the guarantor. EVE, J., held that the section allowed of recovery from the person actually preferred, but decided that there was no intention in this case. The same Judge, in *Re Barling (T. N.) & Co., Ltd. (p)*, found that there was an intention to prefer the guarantors and made an order against the bank which received the moneys and so released the guarantors. He does not appear to have been referred to his earlier decision. In 1934, CLAUSON, J., in *Re Lyons, Ex parte Barclays Bank, Ltd. v. Trustee (q)*, decided against the bank which received the moneys and thus reduced the liability of the guarantor, although he was referred to the decision in *Stanley's Case (supra)*. The Court of Appeal reversed the decision on the facts, but did not touch on the point in dispute. *Re Conley, Ex parte Trustee v. Barclays Bank, Ltd., Re Conley, Ex parte Trustee v. Lloyds Bank, Ltd. (r)*, was

(*m*) 1 Halsbury's Statutes 716.

(*n*) 1 Halsbury's Statutes 649.

(*o*) [1925] Ch. 148; Digest Supp.

(*p*) Unreported, but see "Journal of Institute of Bankers", 1937, vol. lviii, p. 340.

(*q*) (1934), 152 L.T. 201; Digest Supp.

(*r*) [1937] 4 All E.R. 438.

decided on the same section. The Court of Appeal held that a person was a surety or guarantor within the meaning of the section, even though he undertook no personal liability for the debt but merely made certain security available, by deposit, to the banker for the debt of the principal debtor. In *Re Seymour, Ex parte Trustee (s)*, it was held that s. 44 did not apply to payments made by the debtor after the presentation of the petition in bankruptcy; that such payments were protected by s. 45.

Seeing that a banker cannot know for what purpose a payment is being made, and in view of the difficulty of obtaining repayment from a guarantor who is released, it would seem that there is here opportunity for legislative relief.

SECTION 6.—PAYMENTS TO UNDISCHARGED BANKRUPT

Questions have been raised as to whether a banker should pay or refuse to pay an open cheque drawn by a solvent customer, but payable to and presented by an undischarged bankrupt, known as such to the banker. It may be as well to dispose of the matter here, while dealing with bankruptcy, rather than under the heading of 'The Paying Banker'.

It is clear that the clause as to bankers in s. 47, above cited, has no application here; that refers exclusively to the bankrupt's own banker. It is a question between the banker's duty to obey his customer's order and his duty to safeguard that customer's interests and obtain a good discharge of the cheque. To be a good discharge the payment must be in good faith and without notice of defective title in the holder (*t*). For the banker to charge his customer the payment must be in good faith and, according to some authorities, without negligence. The banker cannot possibly know whether his customer was aware that the payee was a bankrupt, nor can he know whether the cheque is or is not the result of a dealing for value with the bankrupt in respect of after-acquired property.

Moreover, it is by no means clear that the legislation as to after-acquired property does more than establish the title of the person dealing with the bankrupt for value in respect of the latter's after-acquired property; it seems to leave open the question whether the bankrupt gets for good, as against the trustee, property which he receives as the result of the transaction, say a cheque he gets on the sale of after-acquired goods. Indeed, it is practically certain that he does not. No doubt, till the trustee intervenes, the bankrupt can deal with such as after-acquired property, but the payment of the cheque is not a dealing with the bankrupt for value.

(s) [1937] Ch. 668; [1937] 3 All E.R. 499; Digest Supp.

(t) Bills of Exchange Act, 1882, s. 59; 2 Halsbury's Statutes 66.

Therefore the banker would not be paying without notice of defective title, would not get a discharge for the cheque, and would possibly be held to have acted negligently.

It would thus seem advisable not to pay in such circumstances, safeguarding the customer's credit by the answer on the cheque.

SECTION 7.—OVERDRAFT

Overdraft

A banker is not obliged to let his customer overdraw unless he has agreed to do so or such agreement can be inferred from course of business (*u*).

The drawing a cheque or accepting a bill payable at the bank, when there are not funds sufficient to meet it, is presumably a request for an overdraft (*w*). But see *London Chartered Bank of Australia v. McMillan* (*y*), where the overdraft arose through the unauthorised act of an agent and there were facts which should have put the bank on inquiry.

Interest

There is no common law right to charge even simple interest on an overdraft. The claim could, however, be supported on the ground of universal custom of bankers. Where the customer has acquiesced in the system under which the interest is charged, that also would justify the claim (*z*). Such acquiescence will justify the charging compound interest or interest with periodical rests, so long as the relation of banker and customer exists, and is not, for instance, altered into that of mortgagee and mortgagor (*a*). The taking a mortgage to secure the fluctuating balance of an account is not, however, inconsistent with the relation of banker and customer so as to preclude compound interest (*b*).

The effect of the practice of bankers in debiting interest to current account periodically and thereby increasing the capital sum has recently been the subject of decision and *dictum*. In *Holder v. Inland Revenue Commissioners* (*c*), the Court of Appeal approved the statement of LORD COWAN in *Reddie v. Williamson*

(*u*) *Brooks & Co. v. Blackburn Benefit Society* (1884), 9 App. Cas. 857, at p. 864; 7 Digest 487, 199; *Cumming v. Shand* (1860), 5 H. & N. 95; 3 Digest 264, 806 (course of business).

(*w*) *Eaton v. Bell* (1821), 5 B. & Ald. 34; 3 Digest 261, 790; *Forster v. Clements* (1809), 2 Camp. 17; 3 Digest 227, 611; *Brooks & Co. v. Blackburn Benefit Society* (1884), 9 App. Cas. 857, at p. 864; 7 Digest 487, 199; *Cuthbert v. Roberts, Lubbock & Co.*, [1909] 2 Ch. 226, at p. 233; 3 Digest 286, 884.

(*y*) [1892] A.C. 292; 3 Digest 262, 795.

(*z*) *Gwyn v. Godby* (1812), 4 Taunt. 346; 3 Digest 265, 813; *Crosskill v. Bower, Bower v. Turner* (1863), 32 Beav. 86; 3 Digest 265, 816.

(*a*) *Fergusson v. Fyffe* (1841), 8 Cl. & Fin. 121; 3 Digest 195, 412; *Williamson v. Williamson* (1869), L.R. 7 Eq. 542; 3 Digest 245, 707; *London Chartered Bank of Australia v. White* (1879), 4 App. Cas. 413, at p. 424; 3 Digest 265, 818.

(*b*) *National Bank of Australasia v. United Hand in Hand Bank of Hope Co.* (1879), 4 App. Cas. 391; 3 Digest 266, 821.

(*c*) [1932] A.C. 624; affirming [1931] 2 K.B. 81; Digest Supp.

(d), "that the periodical interest at the end of each year is a debt to be then paid, and which must be held to have been paid when placed to the debit of the account as an additional advance by the bank for the convenience of the obligants". The case went to the House of Lords and the decision was confirmed, but the above point was not touched on by the House, their judgment being given on the construction of s. 36 (1) of the Income Tax Act, 1918 (e). In *Paton v. Inland Revenue Commissioners* (f), however, the point was dealt with by LORD ATKIN in the following terms :

"The question is whether, when the charges are added to the existing indebtedness at the end of one half-year and the whole sum brought down is a debit item at the beginning of the next half-year so that interest is charged on the last half-year's interest, the charges have been paid. The ordinary man would, I think, say that so far from being paid, they are added to the ordinary indebtedness because they are not paid ; and I see no reason why the law should say anything different."

His Lordship then quoted RUSSELL, J., in *Re Jauncey, Bird v. Arnold* (g) with approval, that the contention that interest must be deemed to have been paid

"would really amount to a travesty of the actual facts ; because in the case of such a provision as is contained in the present deed which enables the interest to be capitalised, the interest is not capitalised because it is in fact paid, but because it has in fact not been paid."

His Lordship further referred to the "system adopted by the banks . . . for the purpose of giving them compound interest without perhaps flaunting the fact before their customers". This does not, however, affect the question whether a banker is entitled to charge compound interest. The cases referred to immediately above were tax cases and the question which came up in each of them for decision was whether the interest had, for tax purposes, been paid.

SECTION 8.—APPROPRIATION OF PAYMENTS

The law as to appropriation of payments, so far as it concerns bankers, is authoritatively summarised in *Deeley v. Lloyds Bank, Ltd.* (h). At p. 783 LORD SHAW says :

"According to the law of England, the person paying the money has the primary right to say to what account it shall be appropriated ; the creditor, if the debtor makes no appropriation, has the right to appropriate ; and if neither exercises the right of appropriation, one can look on the matter as a matter of account and see how the creditor has dealt with the payment in order to ascertain how in fact he did appropriate it. And if there is nothing more than a current account kept by the creditor, or a particular account kept by the creditor and

(d) (1863), 1 Macph. (Ct. of Sess.), 228 ; 7 Digest 194, n.

(e) 9 Halsbury's Statutes 443. (f) [1938] A.C. 341 ; [1938] 1 All E.R. 786.

(g) [1926] Ch. 471 ; 32 Digest 317, 35.

(h) [1912] A.C. 756 ; 12 Digest 488, 3996.

he carries the money to that particular account, then the Court concludes that the appropriation has been made ; and, having been made, it is made once for all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation."

In that case the bank had a mortgage as security for overdraft on current account. They received notice of a second mortgage on the same property. They did not break the account but carried to it moneys subsequently paid in. These, being attributed, under the rule in *Devaynes v. Noble, Clayton's Case (j)*, to the earlier drawings out, extinguished the secured debt, and left the bank correspondingly unsecured with regard to subsequent advances.

The Court of Appeal, by a majority, decided in favour of the bank ; the House of Lords reversed this decision and gave judgment against the bank, applying the principle above laid down. In the Court of Appeal, MOULTON, L.J., one of the majority, delivered a most plausible judgment, contending that *Devaynes v. Noble, Clayton's Case*, only established a rule of rebuttable evidence ; that appropriation was a matter of intention and that it was absurd to attribute to a bank the intention to appropriate payments in to a secured rather than an unsecured debt, and he ridiculed the recognition of a legal rule which the bank could circumvent by " the simple formality of drawing two horizontal lines in their books and making believe to commence a new account ". But the House of Lords decided otherwise.

The moral is that the process ridiculed by MOULTON, L.J., should always be followed where it is desired to preserve a security on which further advances cannot be charged. The account should be ruled off, and a new account opened if further business is contemplated (*k*).

As to when further advances can be made after notice of a second mortgage or charge see now Law of Property Act, 1925, s. 94 (*l*), and ' Securities for Advances ', *post* ; but this does not touch the rule above laid down as to appropriation of payments.

There are two contentions, not lacking in authority, which seem to be inconsistent with this case, which it would have been well to have had more definitely dealt with :

1. that a creditor's right of appropriation enured and was not finally exercised, even when there was a current account, accounts stated being only rebuttable evidence of such exercise (*m*) ;

(j) (1816), 1 Mer., 572, at p. 608 ; 12 Digest 483, 3961.

(k) See *per* LORD SHAW in *Deeley v. Lloyds Bank, Ltd.*, [1912] A.C. 756, at p. 785 ; 12 Digest 488, 3996.

(l) 15 Halsbury's Statutes 273.

(m) See *Cory Brothers & Co. v. Mecca, Turkish Steamship (Owners), The Mecca*, [1897] A.C. 286, at p. 295 ; 12 Digest 478, 3905 ; *Seymour v. Pickett*, [1905] 1 K.B. 715 ; 12 Digest 478, 3909.

2. that a creditor's appropriation does not bind him unless communicated to the debtor (n).

These cases, or some of them, were referred to in *Deeley v. Lloyds Bank, Ltd.*, but no very definite ruling given with regard to them.

Still, it is to be noted that there is no mention of any such qualification in the law as laid down by LORD SHAW, which he adopted from EVE, J. Nor does the case state that there was communication to the customer.

Then there is the rule published by the bank for the guidance of its staff, which ran thus :

"Wherever notice is received of a second mortgage or a second charge on any security on which the banker holds a proper charge, the account must at once be ruled off and a separate account opened for subsequent transactions."

There is nothing here about communicating with the customer ; yet LORD SHAW described the adoption of this rule as a mode of protection open to bankers as familiar and simple as could be imagined, by which the bank quite easily and naturally secures its own protection. On the basis therefore of this authority, bankers would be well advised not to rely on either of the two above-mentioned propositions. It might be wise, however, to bring to the customer's notice the closing of the old account and the opening of the new one.

(n) *Simson v. Ingham* (1823), 2 B. & C. 65 ; 3 Digest 245, 710 ; *London and Westminster Bank v. Button* (1907), 51 Sol. Jo. 466 ; 3 Digest 307, 1008 ; cf. *Rekstin v. Severo Sibirsko Gosudarstvennoe Akcionerhoe Obschestro Komseveiputj and Bank for Russian Trade*, [1933] 1 K.B. 47 ; Digest Supp.

CHAPTER 5

OBLIGATIONS AND INCIDENTS INDIRECTLY ARISING FROM THE RELATION OF BANKER AND CUSTOMER

SUMMARY—

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THERE are duties incumbent on and services undertaken by bankers in connection with their business which arise out of, but are not essentially included in, the relation of banker and customer.

Among these may be reckoned the following : (1) the duty of secrecy ; (2) the giving information as to the credit and standing of the customer, commonly known as a banker's reference ; (3) the receipt of valuables for safe custody.

SECTION 1.—THE DUTY OF SECRECY

The law on this matter has been most clearly and comprehensively laid down by the Court of Appeal, and especially by BANKES, L.J., in *Tournier v. National Provincial and Union Bank of England* (a). As the Lord Justice says, this was a difficult and hitherto only very partially investigated branch of the law. The judgment establishes the following propositions.

The duty is a legal one, arising out of contract, not merely a moral one. Breach of it, therefore, gives a claim for nominal damages, or for substantial damages if injury has resulted from the breach. It is, however, not an absolute duty, as has been contended, but qualified, being subject to certain reasonable, if not essential, exceptions. The Lord Justice said :

“In my opinion it is necessary in a case like the present to direct the jury what are the limits and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle I think that the qualifications can be classified under four heads: (a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer.”

(a) [1924] 1 K.B. 461 ; Digest Supp.

And he gives instances :

- (a) the duty to obey an order under the Banker's Books Evidence Act ;
- (b) (quoting LORD FINLAY), cases where a higher duty than the private duty is involved, as where danger to the state or public duty may supersede the duty of the agent to his principal ;
- (c) of a bank issuing a writ claiming payment of an overdraft, stating on the face of it the amount of the overdraft ;
- (d) the familiar case where the customer authorises a reference to his banker.

Compulsion by law under (a) must be confined to the regular exercise by the proper officer of actual legal power of compelling disclosure. It is not every inquiry made by a government official which falls within this heading. It could hardly be suggested that s. 103 of the Income Tax Act, 1918 (b), would justify an inquisitorial investigation into all a bank's customers and their accounts. But in *Att.-Gen. v. National Provincial Bank, Ltd.* (c), a test case, ROWLATT, J., held that in the four cases submitted to him the bank was liable, under s. 103, to prepare and deliver lists of the names and addresses of all persons on whose behalf it received interest in respect of 5% War Loan, 1929-47, inscribed or registered, and 5% and 4% National War Bonds, registered. The four cases were : when the bank was acting as trustee or executor under a will or settlement ; when the stock was taken as direct security for a loan ; when the stock was taken as security for the account of a third party ; when the stock was registered in the names of the bank's nominees at the request of the stock-holder. Schedule C, rule 8, of the same Act (d) contains, with regard to the collection of foreign dividends or coupons, a saving clause to the effect that " nothing in these rules shall impose on any banker or person acting as a banker the obligation to disclose any particulars relating to the affairs of any person on whose behalf he may be acting ". It is not very obvious why the duty and privilege of secrecy is specially safeguarded in this connection. Possibly it was felt that the banker is in rather a delicate position in collecting coupons, as he is himself primarily responsible for the tax, and it was considered advisable to afford him a ready and complete answer to any insidious inquiries by the Inland Revenue. By ss. 136 (2) and 277 (6) of the Companies Act, 1929 (e), a company's banker is made an agent of the company in case of prosecution of a director, manager, or officer of the company, and so bound to give the Public Prosecutor " all

(b) 9 Halsbury's Statutes 477.

(c) (1928), 44 T.L.R. 701 ; Digest Supp.

(d) 9 Halsbury's Statutes 558.

(e) 2 Halsbury's Statutes 863,961.

assistance which he is reasonably able to give". By s. 369 (f), the right of the defendant's solicitor not to disclose privileged communications is reserved. Is a company's banker "reasonably able to give" information detrimental to a director and derived from him?

The duty of secrecy does not cease the moment a customer closes his account. BANKES, L.J., says :

"Information gained during the currency of the account remains confidential unless released under circumstances bringing the case within one of the classes of qualification I have already referred to."

It probably enures after the customer's death.

The duty of non-disclosure applies whether the account is in credit or overdrawn. The confidence is not confined to the actual state of the customer's account. It extends to information derived from the account itself. In fact it is wide enough to cover all information acquired by the banker in his character as such, and bankers would be well advised to put a liberal construction on this definition.

SECTION 2.—GIVING INFORMATION AS TO CREDIT AND STANDING OF CUSTOMER—BANKERS' REFERENCES—ADVISING AS TO INVESTMENTS

The previously accepted views on the banker's position with regard to these matters have had to be modified since the majority judgment of the House of Lords in *Banbury v. Bank of Montreal* (g). It was generally held that when a banker gave information to a customer or a third person as to the credit or financial position of an individual or concern, the banker was not liable to the person to whom it was given for loss accruing through its being false unless the representation was in writing and signed by the banker himself, the signature of a bank manager not being for this purpose that of his bank.

Lord Tenterden's Act

Lord Tenterden's Act, s. 6 (h), was supposed to enact this, and the view was supported by *Swift v. Jewsbury and Goddard* (j) and *Hirst v. West Riding Union Banking Co., Ltd.* (k).

In *Banbury's Case* (g), the House of Lords, though differing on other points, were unanimous that Lord Tenterden's Act had really no bearing on the matter. As they pointed out, its wording, "signed by *the party to be charged therewith*", and the circumstances of its enactment clearly show that the Act only applies to false and fraudulent representations as to the

(f) 2 Halsbury's Statutes 1002.

(g) [1918] A.C. 626, 3 Digest 164, 254.

(h) Statute of Frauds Amendment Act, 1828; 3 Halsbury's Statutes 584.

(j) (1874), L.R. 9 Q.B. 301; 3 Digest 163, 250.

(k) [1901] 2 K.B. 560; 3 Digest 164, 252.

credit of a third party and only to actions on such representations. They cited with approval the words of BRAMWELL, B., in *Swift v. Jewsbury and Goddard*, *ubi supra* :

"The effect of the statute is this, that a man shall not be liable for a fraudulent misrepresentation as to another person's means unless he puts it down in writing and acknowledges his responsibility for it by his own signature."

And the House of Lords affirmed the pre-existing view that, in any event, the signature of a bank manager was not sufficient to bind the bank under the Act.

So it comes to this : Lord Tenterden's Act can only be invoked by the bank in the event of the bank being sued for a false *and fraudulent* misrepresentation as to the credit of a third party, and it would seem that the representation would have to be made under the bank's seal. Innocent representation it does not touch.

Negligence

Putting fraud out of the question, what ground of liability can be suggested against the bank ? "An innocent representation, *per se*, constitutes no cause of action" (1). Apart from the doubtful case of an action for tort, the only remaining possibility is an action for negligence in making the representation, not on the representation itself. As LORD WRENBURY says in *Banbury's Case*, at p. 713 :

"The innocent misrepresentation is not the cause of the action, but evidence of the negligence which is the cause of action."

But there are difficulties in the way of such an action. There can be no negligence without a duty ; the plaintiff must show that a duty existed towards him and a breach of that duty. BANKES and SCRUTTON, L.JJ., in *Evans v. Barclays Bank and Galloway (m)*, gave a majority decision against the bank, refraining from expressing an opinion whether a duty existed, but holding that its existence was not so unarguable as to justify striking out the statement of claim—on the ground that the power of arresting an action and deciding it without trial was one to be very sparingly used and rarely, if ever, except in cases where the action is an abuse of legal procedure. SARGANT, L.J., dissented. Galloway, a manager of the bank, had made untrue statements on which the plaintiffs relied and, as a result, suffered loss. A master in chambers struck out the statement of claim as disclosing no reasonable cause of action. ROCHE, J., reversed that decision on appeal and was supported by a majority of the Court of Appeal, as shown above. In *Batts Combe Quarry Co. v. Barclays Bank, Ltd. (n)*, AVORY, J.,

(1) *Per* LORD WRENBURY, in *Banbury v. Bank of Montreal*, at p. 713 ; cf. *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30 ; 9 Digest 251, 1565.

(m) [1924] W.N. 97 ; Digest, Pleading 75, 647.

(n) (1931), 48 T.L.R. 4 ; Digest Supp.

directed the jury to find for the bank, which had replied favourably to inquiries concerning a customer, on the ground that there was no evidence of negligence. He said that the authorities showed that the only duty, if any, was a duty not to be negligent.

In *Banbury's Case* the plaintiff was not, though he previously had been, a customer, he paid no money into the bank, and was merely recommended to their kind offices by a customer. He was charged nothing for the advice he got as to the credit and standing of the company in which he invested and lost his money. A local, not a head, manager was the actual person who gave the advice. The question narrowed down to whether it was part of a bank's business to advise on investments. As LORD WRENBURY said, the question whether it was within the scope of their business was at the root of the matter. And that question was crucial in two respects.

First, if advising was within the scope of the business, it established a duty and also a measure of the skill, non-exercise of which would constitute negligence. The case was treated as analogous to that of gratuitous services rendered by a person professing special knowledge and skill in a particular line, say a surgeon. If he volunteers his aid and it is accepted, the confiding his body to him by the patient is sufficient consideration to raise a duty on the part of the surgeon to bring to the case and use such skill and care as are reasonably to be expected from a man of his position and pretensions. LORD FINLAY said :

"The limits of a banker's business cannot be laid down as a matter of law. If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently."

LORD PARKER said :

"It would be difficult to establish that advising on investments was part of the business of banking",

but in a context from which it is not clear whether he was giving his own opinion or explaining why counsel for the appellant had made the admission that advising on investments at large was not within the scope of the bank's business.

In the second place, the question whether advising on investments was within the scope of the bank's business was material, because on it depended whether the local manager had authority to bind the bank, whether negligence on his part would constructively be negligence on the part of the bank.

It had been contended that a general manager might have such authority, but not a local manager.

Here again opinions differed. The two law lords, FINLAY and SHAW, who were in favour of the plaintiff, held that the authority extended to the local manager ; of the three, PARKER, ATKINSON and WRENBURY, who decided in favour of the bank,

LORD PARKER based his judgment mainly on this ground that there was no evidence on which a jury could find that the bank were bound by the act of the manager, and so the question of negligence did not arise. LORDS ATKINSON and WRENBURY were more influenced by the consideration that advising on investments was not shown to be within the scope of the bank's business, and therefore there could be no authority to devolve.

In LORD WRENBURY's opinion, if the first proposition had been proved, the devolution of authority would have automatically included not only the general, but the local, manager. As he forcibly puts it (o) :

" Either advising on investments was within the business of bankers or it was not. If it was, then not the head manager only, but the local manager, within his district, would also hold authority to do that business so as to bind his principals. If it was not, then the head manager could not do it, neither could he authorise the local manager to do it."

Save for the authoritative exposition of Lord Tenterden's Act, this case cannot be regarded as very conclusive.

Should the question again arise, it seems probable that evidence would be forthcoming that advising on investments was the common practice of bankers, and if it were shown that they shared in the broker's commission, a Court would very likely find it to be a part of banking business. (oo)

There appears to be some subtle distinction between advising on investments and giving information as to the credit and standing of third parties. In *Robinson v. National Bank of Scotland* (p), also a House of Lords case, the bank and their agent were being sued for false and fraudulent representation as to the credit and standing of two persons with whom the pursuer became co-guarantor. LORD HALDANE said (q) :

" In a case like this no duty to be careful is established. There is the general duty of common honesty, and that duty of course applies to the circumstances of this case as it applies to all other circumstances. But where a mere inquiry is made by one banker of another, who stands in no special relation to him, in the absence of special circumstances from which a contract to be careful can be inferred, I think there is no duty excepting the duty of common honesty to which I have referred."

This case, decided in 1916, was not cited in *Banbury v. Bank of Montreal*. Answering such inquiries from another bank acting on behalf of a customer is within the scope of banking business (r), and it is difficult to see why there should be no duty

(o) [1918] A.C. at p. 715.

(oo) See in this connection, *Thornett v. Barclays Bank (France), Ltd.*, [1939] 1 K.B. 675 ; [1939] 2 All E.R. 163 ; Digest Supp.

(p) (1916), 53 Sc.L.R. 390 ; 3 Digest 163, 250 H. (q) *Ibid.*, p. 392.

(r) *Swift v. Jewsbury and Goddard* (1874), L.R. 9 Q.B. 301 ; 3 Digest 163, 250 ; *Parsons v. Barclay & Co., Ltd.* (1910), 103 L.T. 196 ; 3 Digest 305, 291.

to be careful in this case, whatever be the status of advising on investments. In *Parsons v. Barclay & Co., Ltd. (s)*, COZENS-HARDY, M.R., is reported as saying that

“he wished emphatically to repudiate the suggestion that when a banker was asked for a reference of this kind it was any part of his duty to make inquiries outside as to the solvency or otherwise of the person asked about, or to do anything more than answer the question put to him honestly from what he knew from the books and accounts before him.”

This recognises a duty in somewhat larger terms than does LORD HALDANE. But on either basis, not much responsibility would seem to attach to the banker. Yet it has to be remembered that BANKES, L.J., implied in *Tournier's Case (supra)* that even as between bankers an answer should only be given at the request, and consequently with the knowledge, of the customer about whom the inquiry is made. COZENS-HARDY, M.R., in *Parsons v. Barclay & Co., Ltd. (s)*, at p. 199, seemed to have the same conclusion in mind, for he referred to “that very wholesome and useful habit by which one banker answers in confidence, and answers honestly, to another banker, the answer being given at the request and with the knowledge of the first banker's customer”. It is doubtful whether the practice is so common and so well recognised that it can be regarded as implicitly authorised by all customers of the banks. It might well be necessary to establish knowledge of the practice, particularly, perhaps, where an answer is given to a trade protection society.

Wilson v. United Counties Bank, Ltd. (t), was an exceptional case. The plaintiff, a customer of the bank, was leaving for war service. It was agreed between him and the general manager that the local manager at B. should supervise the plaintiff's business and see it carried on, particularly the financial side, and take all reasonable steps to maintain his credit and reputation. The jury found that the bank were negligent in performing their duties under this agreement and awarded £45,000 damages for loss to plaintiff's estate, and £7,500 for injury caused to his credit and reputation. The House of Lords, reversing the Court of Appeal, restored the judgment for these amounts. It cannot be that functions such as these are within the scope of banking business. The plaintiff was overdrawn, but the overdraft was secured and there does not appear to have been any other consideration for the agreement. *Banbury v. Bank of Montreal* does not seem to have been cited, nor is there any reference to the scope of banking business in the judgments. It is difficult to see where the duty of the bank came in, or how the general manager could bind the company.

(s) (1910), 103 L.T. 196 ; 3 Digest 305, 991.

(t) [1920] A.C. 102 ; 5 Digest 974, 7971.

SECTION 3.—THE RECEIPT OF VALUABLES FOR SAFE CUSTODY

For the convenience of customers bankers assume charge of plate chests, securities, and other valuables. Usually no charge is made for such accommodation. In common phraseology, the goods are said to be delivered to the banker for 'safe custody', and in acknowledgments and receipts these words, 'for safe custody', generally occur.

No additional liability by reason of words 'for safe custody'

It appears clear that the use of these words does not affect the measure of liability of the banker; does not make him an insurer. Some of the early cases on the point are difficult to reconcile. They are all studiously reviewed in *Ross v. Hill* (u), where the Court arrived at the conclusion that an undertaking in such terms must be interpreted in the light of the legal consequences arising from the relation between the parties, and that the express contract did not extend the liability.

Bailee for reward or gratuitous

The first question, therefore, is, what is the relation between banker and customer where the goods are received by the former; is the banker a bailee for reward, with the liabilities attaching to that position, or a gratuitous bailee with only the liabilities of such?

It has been contended that the custom of bankers' taking charge of their customers' valuables is so common that it is an implied part of the contract, when a man opens an account, that the banker will, if required, receive his valuables to a reasonable extent and for a reasonable time; that the opening the account affords consideration for this undertaking, as well as for the ordinary duty to repay the money and to honour cheques. It would, of course, be open to the customer, when opening the account, to make express stipulation as to such accommodation; in which case there would be sufficient consideration to place the banker in the position of a bailee for reward.

Banker usually gratuitous bailee

But in the ordinary state of affairs, where nothing is said at the time of opening the account, and where there is no payment for the accommodation, the position of the banker is that of a gratuitous bailee. It was so held in *Giblin v. M'Mullen* (w); *Re United Service Co., Johnston's Claim* (x); and *Leese v.*

(u) (1846), 2 C.B. 877; 3 Digest 61, 48.

(w) (1868), L.R. 2 P.C. 317; 3 Digest 256, 761.

(x) (1870), 6 Ch. App. 212; 3 Digest 256, 763.

Martin (y). It is true that in *Brandao v. Barnett (z)*, LORD CAMPBELL, speaking of the custom of bankers to receive the interest on exchequer bills for their customers, says :

"I think that the transaction is very much like the deposit of plate in locked chests at a banker's. A special verdict might find that it is the custom of bankers, in the course of their trade as such, to receive such deposits from their customers, but I do not think that from that finding a general lien could be claimed on the plate chests. In both cases, a charge might be made by the bankers, if they were not otherwise remunerated for their trouble."

This *dictum* is, however, too vague and indirect to stand against the authorities on the other side. There is no suggestion of any such custom or undertaking in the summary of the reciprocal implied agreement between banker and customer by ATKIN, L.J., in *Joachimson v. Swiss Bank Corporation (a)*.

Langtry v. Union Bank

In consequence of the apprehension excited among bankers by the case of *Langtry v. Union Bank of London (b)*, the Committee of the Central Association of Bankers, after taking copious and conflicting legal advice, issued a report on the whole question, which is published in the "Journal of the Institute of Bankers," vol. xvii, p. 455, in which they say :

"The better opinion seems to be that when a banker takes charge of a locked box, supposed to contain valuables (the contents of which, however, are not known to the banker, and to which he has no access), he would be held to be a gratuitous bailee."

Degree of care required from gratuitous bailee

The degree of care which a gratuitous bailee is bound to take of property entrusted to him is defined in *Giblin v. M'Mullen (c)*, thus :

"He is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description."

The employment of the facilities at the banker's disposal, such as safes, strong-rooms, etc., must, it is submitted, be included in the care a banker must take of his customer's valuables. The utilisation of available means of securing safety is an ingredient in the reasonable care a prudent man would take of his own valuables.

It has been contended that this is not fair on the banker ; that it is raising him, who receives nothing, to the same level as a bailee for hire, whose obligation is to put himself in a position to take the highest degree of care possible, to adopt all precautions and means of ensuring safety known to contemporary

(y) (1873), L.R. 17 Eq. 224 ; 3 Digest 256, 765.

(z) (1846), 3 C.B. 519 ; 12 Cl. & Fin. 787, at p. 809 ; 3 Digest 290, 902.

(a) [1921] 3 K.B. 110 ; Digest Supp.

(b) (1896), "Journal of Institute of Bankers", vol. xvii, p. 388.

(c) (1868), L.R. 2 P.C. 317, at p. 339 ; 3 Digest 256, 767.

science (d) ; and that it is unreasonable that the strong-rooms and safes, which a banker happens to have for his own purposes, should be gratuitously at the service of the customer, who could nowhere else get the same convenience without paying for it. But the rule as above laid down holds good. The distinction is really this ; the gratuitous bailee must do his best with what he has got, he must use all facilities of which he is possessed, but he is not bound to do more. He is not bound to provide at his own expense the means of ensuring a higher degree of security for the articles deposited with him ; whereas the bailee for hire is bound, as before stated, to adopt at his own expense all appliances and safeguards procurable.

Banks being generally provided with such appliances and safeguards, the question as to whether the banker is a gratuitous bailee or a bailee for reward becomes practically an academic one in estimating the degree of care to which he is bound.

Knowledge of nature of articles

It does not seem that the banker's knowledge or ignorance of the nature of the goods entrusted to him affects the question of his liability.

The rule was laid down in *Giblin v. M'Mullen* in the form given, without any qualification as to knowledge or ignorance ; and the facts of that case go very strongly to show that in that instance the bank had no knowledge or means of knowledge of the nature of the goods. Damages for negligence are such as are supposed to have been in the contemplation of the parties at the date of the contract ; and if the goods are taken without inquiry, such contemplation would seem to embrace the value of the goods, whatever it might prove to be. If a customer brings a box for safe custody, there is a presumption that it contains articles of value. If, however, he mislead the banker in any way as to the value, he would infallibly be held bound by his representations, and could hold the banker to no greater liability, either as to degree of care or amount of compensation, than was commensurate with goods of the character represented by him ; if indeed that.

Liability for fraud of servants

Apart from negligence facilitating such an act, a bank is not liable for the loss of a customer's goods by the fraud or felony of members of its own staff. In *Foster v. Essex Bank* (e), the cashier and chief clerk of the bank fraudulently took, and absconded with, specie deposited by a customer. The Court held that the bank was not responsible for their fraud or felony, as, when they abstracted the customer's gold from the cask in

(d) Cf. *Queensland National Bank v. Peninsular and Oriental Steam Navigation Co.*, [1898] 1 Q.B. 367 ; 41 Digest 478, 3108.

(e) 17 Massachusetts Reports, 478 (approved in *Giblin v. M'Mullen*).

which it was contained, they were not acting within the scope of their employment ; and added :

“ The bank was no more answerable for their act than it would have been if they had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank.” (f)

The case of *Langtry v. Union Bank of London* (g), which was settled by judgment for the plaintiff by consent for £10,000, arose out of the delivery of the goods to an unauthorised person, on a forged order. The bank's counsel, in announcing the settlement in court, said that the bank would not have submitted to any judgment implying negligence on the part of their officials without the fullest investigation of the law and the facts.

What right of action apart from negligence

The question naturally arose as to what right of action, if any, accrued to a customer in like circumstances, apart from negligence ; and legal opinion was, as before stated, divided on the point. The Central Association of Bankers went fully into the matter, and in their memorandum, previously alluded to, they say :

“ It is necessary to distinguish between cases in which valuables are by mistake delivered to the wrong person (as in Mrs. Langtry's case) and cases in which they are destroyed, lost, stolen, or fraudulently abstracted, whether by an officer of the bank or by some other person.

The best legal opinion appears to be that, in the former case, the question of the negligence of a bailee does not arise, that the case is one of wrongful conversion of the goods, and that the bank is liable for this wrongful conversion, apart from any question of negligence.”

Commission and omission

Though controverted by some, this view is undoubtedly correct. It is founded on the distinction between commission and omission, between the active interference with the property, involved in the voluntary handing over of the goods to a person not entitled to receive them, and the mere passive neglect of duty which may result in their loss. The former, if induced by specious fraud, may be in no wise blameworthy, but conversion is independent of any such consideration.

Authorities in point

Authority for this position is not wanting. The cases have usually been those of carriers who have delivered goods to the wrong person. The earlier authorities are summarised in *Stephenson v. Hart* (h), PARKE, J., saying :

“ From the cases which have been cited it is clear that trover lies against a carrier for misfeasance in delivering a parcel to a wrong

(f) Cf. *Cheshire v. Bailey*, [1905] 1 K.B. 237 ; 3 Digest 88, 218.

(g) (1896), “ Journal of Institute of Bankers ”, vol. xvii, p. 338.

(h) (1828), 4 Bing. 476 ; 8 Digest 32, 182.

person. In *Ross v. Johnson* (i) a distinction was taken between misfeasance and nonfeasance, and it was holden that trover would not lie where a carrier had lost goods by a robbery or theft, LORD MANSFIELD and ASTON, J., considering that a case of mere omission. But in *Youl v. Harbottle* (j), LORD KENYON, referring to *Ross v. Johnson*, said that where the carrier was actor and delivered the goods to a wrong person he was liable in trover."

GASELEE, J., dissented, on the ground that the goods had in fact been delivered to the person for whom they were intended, although that person had procured their consignment by fraud ; but he says :

"For delivery to a wrong person a carrier is no doubt responsible in trover."

In *McKean v. McIvor* (jj), BRAMWELL, B., in referring to this case, said :

"There were circumstances there to excite suspicion ; but I think the reasoning of GASELEE, J., who dissented from the judgment of the Court, is right. There was nothing to show that it was not West who received the box ; it may rather be collected that it was."

But he does not impugn the law as there laid down ; in fact he says (k) :

"I assume that a misdelivery would have been a conversion".

Involuntary bailees

Duff v. Budd (l) was a case of misdelivery under circumstances of gross negligence, and the judgments are based on that negligence ; but it is submitted that the importation of negligence is accounted for by the fact that the defendant's position was that of involuntary bailee, the contract of carriage having come to an end (m), with the consequent liabilities hereafter appearing.

In *Heugh v. London and North Western Railway Co.* (n) both *Stephenson v. Hart* and *Duff v. Budd* were quoted. In that case, the goods had been tendered by the defendants at the place to which they were addressed, but the person in charge of the premises refused to receive them. The defendants deposited the goods in safety and sent an advice note to the consignees, requesting instructions for delivery, and further, that on sending for them the advice note should be produced. The advice note was presented a few days after by a person who demanded delivery on behalf of the consignees, and the goods were delivered to him.

The Court held that the defendants' character as carriers was at an end when the goods were refused through no default of their own ; and that they thereupon became involuntary bailees,

(i) (1772), 5 Burr. 2825 ; 3 Digest 108, 331.

(j) (1791), Peake, 68, N.P. ; 8 Digest 34, 192.

(jj) (1870), L.R. 6 Exch. 36 ; 8 Digest 33, 189.

(k) *Ibid.*, p. 41.

(l) (1822), 3 Brod. & Bing. 177 ; 8 Digest 43, 256.

(m) See *ibid.*, p. 181.

(n) (1870), L.R. 5 Exch. 51 ; 3 Digest 58, 36.

with no obligation except to act reasonably in the circumstances.

In his judgment, KELLY, C.B., refers to this position of the defendants as involuntary bailees, and asks whether as such they became subject to an absolute duty to deliver to the proper person, so as to be liable for a misdelivery, though without negligence, and says :

"The only authorities in the courts of this country cited in support of that proposition are *Stephenson v. Hart* and *Duff v. Budd* ; but in neither case was it held or even contended that the misdelivery amounted, as a matter of law, to a conversion ; but in both cases it was admitted to be a question for the jury, and the question was in fact left to them, whether, under all the circumstances, the defendants had acted with reasonable care. It is plain then, on the authority of those cases, that misdelivery under such circumstances is not, as a matter of law, a conversion, but that it is a question of fact for the jury whether the defendants have exercised reasonable and proper care and caution."

It is to be noticed that in both the cases quoted in this judgment there had been a previous refusal to accept the goods or a failure to discover the consignee ; so that in them, as in this latter case, the defendants were really in the position of involuntary bailees. In view of his opening question, these remarks of KELLY, C.B., must be confined to the case of involuntary bailees, especially as he says at p. 56 :

"It is true that a misdelivery by a carrier has been held to amount to a conversion."

The case is so explained by BRAMWELL, B., in *Hiort v. Bott (o)*, where he gives as the ground of its decision that an involuntary bailee has the implied authority of the real owner to deal with the goods in any reasonable manner.

In *Hiort v. London and North Western Railway Co. (p)*, BRAMWELL, L.J., says :

"It is held that if a man disposes of property, and in law he did if he without authority delivered it to somebody not entitled to receive it, he might be charged with converting it to his own use. A misdelivery by a carrier was a conversion ; I cannot see, therefore, why a misdelivery by a warehouseman is not a conversion."

Again, in *Glyn, Mills & Co. v. East and West India Dock Co. (q)*, BRAMWELL, L.J., says :

"If a carrier received goods to carry to A. and hold till called for by X., and Y. came and represented himself to be X., a delivery to Y. would be a misdelivery and a conversion according to the authorities."

In *Bristol and West of England Bank v. Midland Railway Co. (r)* LOPES, L.J., says :

"Delivery to a wrong person would be conversion."

There is nothing in the character of a carrier which makes

(o) (1874), L.R. 9 Exch. 86, at p. 90 ; 3 Digest 58, 38.

(p) (1879), 4 Ex. D. 188, at p. 194 ; 3 Digest 78, 168.

(q) (1880), 6 Q.B.D. 475, at p. 493.

(r) [1891] 2 Q.B. 653, at p. 657 ; 8 Digest 226, 1458.

him specially obnoxious to conversion : his liability as insurer is altogether irrelevant to this class of action, and cannot affect it one way or the other. The banker cannot assert the position of an involuntary bailee, and so claim the peculiar privileges of the man who finds goods left on his hands and is only bound to do the best he can in the circumstances. He does voluntarily, though innocently, deliver the goods to a wrong person, thereby dealing with them in a manner inconsistent with the rights of the true owner, which is sufficient to found conversion.

Suggested implied contract

Those who hold the view that the banker is relieved from liability for commission as well as of omission, for misfeasance as well as nonfeasance, unless he is chargeable with negligence, rely mainly on an implied agreement between banker and customer to that effect. They presume a stipulation on the part of the banker that his obligation as to parting with the goods shall be as circumscribed as that with regard to keeping them ; namely, that he shall exercise reasonable care and caution in so doing, and they presume an acquiescence by the customer in such stipulation.

But there seem no sufficient grounds for importing such implied contract into the legal relations arising from the deposit of the goods. The distinction between the legal consequences of loss and of misdelivery can hardly be supposed to have been in the contemplation of the parties ; in the absence of express stipulation, each party must be taken to have accepted merely the legal rights and liabilities automatically arising from the deposit and receipt of the goods ; and "it is impossible to import a condition into a contract which the parties could have imported and have not done so", *per* CHANNELL, J., in *Blakeley v. Muller & Co.* (s). The endeavour to import terms into contracts is persistently discountenanced by Courts nowadays (t). As before stated, the view adopted by the Central Association of Bankers is the true one.

Question of banker's contracting himself out of liability

The question of the banker's expressly contracting himself out of liability for misdelivery has been raised ; but the Central Association of Bankers, in the memorandum above referred to, came to the conclusion that, though in theory possible, such a course would be "generally impossible in practice, and where not impossible inadvisable".

Adopting this view, the question then arises, what steps can the banker take for his own protection against this danger of misdelivery ?

(s) [1903] 2 K.B. 760, n. ; 12 Digest 406, 3276.

(t) *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918] 2 K.B. 623, at ; 6 Digest 161, 1037.

Precautions against misdelivery

The obvious course, where anyone other than the original depositor applies for re-delivery, would be to decline to deliver on the spot, explaining courteously that not the slightest aspersion was cast on the applicant's authority whether as agent or assignee of the original depositor, or on the right and title of such original depositor, but that the temporary delay was a mere precautionary business custom in order to verify the application, and that, if desired, the article or articles would be delivered as soon as the usual inquiries had been made.

Against this it is objected that in so doing the banker, if the application is genuine, is guilty of a technical conversion of the goods, and that he would have to convince a jury that he had reasonable grounds for suspicion, and had acted *bona fide*; or else pay damages to the original depositor or his assignee as the case might be.

The leading authority on the question is that of BLACKBURN, J., in *Hollins v. Fowler* (u) :

"A demand and refusal is always evidence of a conversion. If the refusal is in disregard of the plaintiff's title and for the purpose of claiming the goods either for the defendant or a third person it is a conversion. If the refusal is by a person who does not know the plaintiff's title, and, having a *bona fide* doubt as to the title to the goods, detains them for a reasonable time for clearing up that doubt, it is not a conversion. The principle being, as I apprehend, that the detention, which is an interference with the dominion of the true owner, is, under such circumstances, excused, if not justified."

In *Vaughan v. Watt* (w), LORD ABINGER, C.B., said :

"If the question had been brought before the jury whether a reasonable time had elapsed for the defendant to ascertain the title to the goods, nobody can doubt that they would have come to the same conclusion [viz., that such reasonable time had elapsed]. The mere detention of the goods abstractedly was not a conversion if the delay was only for a reasonable time; here I think the time was unreasonable."

PARKE, B., said :

"It was a question for the jury whether the defendant meant to apply the goods to his own use or assert the title of a third party to them, or whether he only meant to keep them in order to ascertain the title to them and clear up the doubts he then entertained on the subject, and whether a reasonable time for doing so had elapsed; without which it would not be a conversion. It ought, therefore, to have been left to the jury whether the defendant had a *bona fide* doubt as to the title to the goods, and if so, whether a reasonable time for clearing up that doubt had elapsed."

In *Clayton v. Le Roy* (y), FLETCHER MOULTON, L.J., said :

"The authorities show clearly . . . that a man does not act unlawfully in refusing to deliver up property immediately upon demand

(u) (1875), L.R. 7 H.L. 757, at p. 766; 3 Digest 66, 91.

(w) (1840), 6 M. & W. 492, at p. 497; 43 Digest 492, 312.

(y) [1911] 2 K.B. 1031; 43 Digest 493, 314.

made. He is entitled to take adequate time to inquire into the rights of the claimant."

FARWELL, L.J., quoting Baron Bramwell in *Burroughes v. Bayne* (z), said :

" You must in all cases look to see, not whether there has been what may be called a withholding of the property but a withholding of it in such a way as that it may be said to be a conversion to a man's own use. Refusal to deliver up property to the true owner is not in itself a conversion but is evidence of it."

And again :

" I cannot conceive anyone being so foolish as to hand over a watch to a man whom he had never seen and who presented no credentials in writing. In my opinion it was the duty of the defendant to refuse to hand the watch over."

VAUGHAN WILLIAMS, L.J., dissented, but agreed that the defendant might well have the right to inquire into the antecedent history of the watch in that particular case, and added,

" A man may do an act inconsistent with the dominion of the true owner, for instance, if the thing is detained for the purpose of making a reasonable inquiry into the title."

Reading these citations dispassionately, the true conclusion seems to be that there can only be conversion where the defendant asserts a title adverse to that of the true owner, either in himself or a third party (a), or where, while not expressly doing this, he detains the goods from the rightful owner for an unreasonable time, thereby impliedly doing so. If the depositor himself applies, any delay is unreasonable, and refusal is a negation of his title.

Where a professing agent or messenger demands delivery there is, *ex necessitate rei*, a reasonable doubt as to his authority, as real as any doubt as to title. He may be known to the banker in connection with the customer, but that is no assurance that he is acting with the customer's authority on this particular occasion. Reclaiming valuables is not within the scope of anyone's employment. FARWELL, L.J., no doubt speaks of the absence of " credentials in writing ". But he was only enumerating one of the many factors in that case which justified the defendant's refusal ; he does not infer that production of a written document ostensibly signed by the depositor is conclusive evidence of authority. It would be unfair to put any such construction on the Lord Justice's words. The pseudo-messenger in *Mrs. Langtry's Case* produced a most plausible document, written on her notepaper and with her signature forged. It is suggested that a banker is bound to know his customer's signature. MATHEW, J., finally disposed of that untenable contention in *London and River Plate Bank v. Bank of Liverpool* (b).

(z) (1860), 5 H. & N. 296, at p. 308 ; 43 Digest 471, 106.

(a) Cf. *Warren v. Baring Brothers* (1910), 54 Sol. Jo. 720 ; 3 Digest 257, 766.

(b) [1896] 1 Q.B. 7 ; 6 Digest 358, 2362.

It is said one is not bound to anticipate forgery. That ingenuous doctrine was rudely shaken in *London Joint Stock Bank, Ltd. v. Macmillan and Arthur (c)*.

It is, therefore, difficult to see how, in adopting the course suggested above, a bank can bring itself within any of the definitions of conversion. It does not assert any title in itself or any third person ; it does not impugn the title of the depositor or his assignee to the goods ; it merely says : " I claim time to see that all is in order ". And there is a very practical argument in favour of this course. If A. is suing B. for depriving him of his goods and B. has no wish whatever to keep them, it would be a blot on the law if it afforded no means of putting things straight.

So we find in *Bullen and Leake*, 9th ed., 351, *note*, under the head of " Conversion ", the following :

" In this action the Court will sometimes stay proceedings upon a return of the goods and payment of nominal damages and costs, and on such other terms as the Court thinks proper to impose ; but the general practice would appear to be that, if the plaintiff will not consent to accept a return of the goods on the terms considered proper by the Court, he will be allowed to proceed with his action, but if he fails to get substantial damages and so justify his refusal, he may be made to pay the costs subsequent to the application."

And they cite *Hiort v. London and North Western Railway Co.*, *ubi supra*.

Mayne on Damages, 10th ed. (1927), 392, states the same as to staying proceedings. So do *Addison on Torts*, pp. 597-601, and *Clerk and Lindsell on Torts*, 9th ed. (1937), 310 etc.

See also the very full discussion of the whole subject of conversion and detainue by Sir John Salmond, *Law of Torts*, 9th ed. (1936), where, at p. 348, he confirms the above views as to the power of the Court to stay the action on defendant returning the goods. Forms of action are no longer the watertight compartments they were, and if a modern judge saw that the real object of an action for conversion was for dubious damages or merely detainue and that the plaintiff could have had and could have the goods any time he liked, he would not be likely to let the action go to trial. Even if the action were not stayed and went to trial, the bank would not be in great jeopardy.

" Where the defendant is willing to deliver up the chattels, the verdict is generally entered by consent at the value of the thing, but only 1s. to be levied upon its being given up. But this is merely matter of arrangement between the parties ; and if the subject matter has been so injured that justice would not be effected by returning it, the verdict will be absolute for the entire value." (d)

One can hardly contemplate counsel for the plaintiff failing to come to such arrangement, with, if necessary, a certain amount of suasion from the judge. In *Churchill (Lord) v. Whet-*

(c) [1918] A.C. 777 ; 30 Digest 192, 603.

(d) *Mayne on Damages*, 10th ed., 1927, p. 392.

nall (e), the judge, in giving plaintiff his costs, expressly did so only on the ground that "the books should have been returned without further proceedings", i.e., after writ. In *Lloyds Bank, Ltd. v. Chartered Bank of India, Australia and China* (f), SCRUTTON, L.J., lays down the proposition that damages in conversion may be reduced by the return of the articles converted. In the same case SANKEY, L.J., said, at p. 75 :

"But where the defendant in an action for conversion is able to prove that the plaintiff has got back part of the proceeds of the property wrongfully converted, he is *pro tanto* excused."

The reasonable deduction would be that the plaintiff should get no damages or costs at all where the article was tendered to him before action.

Even if the verdict and judgment were for the full value and the goods not returned, on payment of the amount the property would vest in the defendant. See authorities above cited. Work this out on a concrete case. Suppose the Union Bank had declined to deliver the jewels to Mrs. Langtry's supposed emissary, but had sent them round to her house shortly afterwards, and finding the request was genuine, tendered them to her, and she had declined and sued them. What would have been the damages? Whereas the £10,000 the Union Bank paid shows the possible consequences of delivery without taking time for inquiry.

For if you deliver to the wrong person, you lose all. You are unquestionably liable for the value of the goods in conversion, and you have not got the goods to return or to counter-balance the damages.

If the application comes from a transferee or assignee of a chattel or a chose in action such as bonds or an insurance policy, there are one or two further points. The transferee of a chattel has no direct claim against a bailee thereof until the bailee has attorned to him (g). The banker is not the debtor immediately affected by the assignment of a chose in action, nor the person to receive notice if the assignment is under the Law of Property Act, 1925. He is a mere depositary, equally not directly liable to the assignee till he attorns. Both are cases of derivative title, as to which the banker is entitled to satisfy himself. And, save in the case of title-deeds, it might be a question whether in conversion of documents the measure of damages was not merely that of the chattel, viz., the paper itself, the banker not having received any money thereon.

The banker must not remove the goods from the premises where they were received for custody, if it is part of the agreement that they be stored at a particular place. If he store them

(e) (1918), 87 L.J. Ch. 524 ; 43 Digest 488, 255.

(f) [1929] 1 K.B. 40 ; Digest Supp.

(g) Cf. *Dublin City Distillery, Ltd. v. Doherty*, [1914] A.C. 823, at p. 847 ; 37 Digest 6, 17.

elsewhere, he may be liable for their loss or destruction, apart from any question of negligence (*h*). He would, however, be justified in removing them if danger threatened, as in a case of national emergency, but would be wise to obtain the bailor's consent, if possible.

Goods deposited for safe custody are not subject to the banker's lien.

Where chattels are deposited jointly by several persons, the authority of all is requisite before they can be withdrawn (*j*).

Even in the case of death of one of the depositors, directions should be obtained from his legal representative ; the property may not be joint, but common, in which case there is no right of survivorship.

A chose in action may be different, as that is not the subject of ownership in common.

(*h*) *Lilley v. Doubleday* (1881), 7 Q.B.D. 510 ; 3 Digest 77, 163.

(*j*) *May v. Harvey* (1811), 13 East, 197 ; 3 Digest 116, 394 ; *Atwood v. Ernest* (1853), 13 C.B. 881 ; 3 Digest 116, 396 ; *Brandon v. Scott* (1857), 7 E. & B. 234 ; 3 Digest 117, 398.

CHAPTER 6

DEPOSIT ACCOUNTS

SUMMARY—

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DEPOSIT accounts may be of three classes :

1. repayable at call or on demand ;
2. withdrawable on specified notice ;
3. for a fixed period.

No right to draw against

The customer has no right to draw cheques against a deposit account of class 2 or 3, and probably not against a deposit account of class 1.

In *Hopkins v. Abbott* (a), and also in *Stein v. Ritherdon* (b), MALINS, V.C., expressed the view that a deposit account at call was liable to be drawn on by cheque. But, apart from any question of return of the receipt, the obligation to honour cheques is only part of the contract implied between banker and customer, and nowhere else has this ever been recognised as extending beyond the current account. It is clearly not contemplated in the summary of the banker's contractual duties by ATKIN, L.J., in *Joachimson v. Swiss Bank Corporation* (c).

Where the deposit is at call, notice should first be given to transfer to current account. Where it is withdrawable on notice, due notice should first be given, together with a request to transfer to current account at the expiration thereof. In either case, the receipt, if any, should be returned.

In practice, where a customer who has a deposit account draws a cheque which the amount on his current account is not sufficient to meet, it is not unusual for the banker to honour the cheque, relying on his right of set-off against the deposit account ; and the practice seems free from danger.

Deposit is loan

Money paid in on deposit account is a loan to the banker, not a specific fund held by him in a fiduciary capacity (d). The

(a) (1875), L.R. 19 Eq. 222, at p. 228 ; 3 Digest 194, 407.

(b) (1868), 37 L.J. Ch. 369 ; 44 Digest 701, 5434.

(c) [1921] 3 K.B. 110, at p. 127 ; 21 Digest 639, 2188.

(d) *Pearce v. Creswick* (1843), 2 Hare, 286 ; 3 Digest 192, 400 ; cf. *Re Head, Head v. Head*, [1893] 3 Ch. 426 ; 3 Digest 192, 398 ; *Re Head, Head v. Head* (No. 2), [1894] 2 Ch. 236 ; 3 Digest 192, 399.

remarks of NORTH, J., in *Re Tidd, Tidd v. Overell* (e), as reported, are somewhat ambiguous, but are clearly insufficient to establish any fiduciary relation.

SECTION 1.—DEPOSIT RECEIPTS

The judgment in *Joachimson v. Swiss Bank Corporation* (f), which held that the debt due from the banker on current account is not enforceable until actual demand is made for payment, and that therefore the banker cannot set up the Limitation Act, but that nevertheless the credit balance on such account is attachable by garnishee process, does not profess to deal with deposit accounts. A distinguishing feature between deposit and current account is to be found in the receipt for the deposit, which may take the form of a mere receipt or of a voucher the return of which is made a condition precedent to the withdrawal of the money, or of an entry in a deposit book which nowadays is more common. Where the return of the receipt or book is a condition precedent to withdrawal, no cause of action arises until its return (g). In *Atkinson v. Bradford Third Equitable Benefit Building Society* (h), the question was whether the return to the society of a loan pass-book issued by it was a condition precedent to repayment of the loan; but there are strong indications that the Court of Appeal had in mind deposit accounts generally, and considered the same principle applicable to them. For LORD ESHER, M.R., said of and in that case, at p. 380 :

"It has no analogy to the cases cited where money is deposited in a bank to provide for a current account. The case of money paid in on a deposit account would be very different, and we shall know how to deal with it when it comes before us."

He further said :

"Those stipulations are that he shall give them notice of his desire to withdraw the money and that the book shall be produced to the society either by himself or by someone with his written authority. If that be the contract, there is no liability to pay on the part of the society, and no cause of action arises against them until all those stipulations have been fulfilled."

LINDLEY, L.J., said :

"... the fact that they have entered into a special contract at once distinguishes the case from the cases of *Foley v. Hill* and *Pott v. Clegg*" (i) ;

and again :

"... production of the book by the depositor himself or by some

(e) [1893] 3 Ch. 154, at p. 156 ; 3 Digest 193, 402.

(f) [1921] 3 K.B. 110 ; 21 Digest 639, 2188.

(g) *Re Dillon, Duffin v. Duffin* (1890), 44 Ch. D. 76, per COTTON, L.J., at p. 81 ; 3 Digest 195, 410.

(h) (1890), 25 Q.B.D. 377 ; 7 Digest 487, 202.

(i) See p. 28, ante.

person with his written authority were conditions precedent to the right to receive back the money."

In *Re Tidd, Tidd v. Overell* (j), NORTH, J., appeared to understand LORD ESHER's words as pointing to the necessity of the return of the receipt before the deposit could be withdrawn. It is really a question of the contract between the parties, as evidenced by the receipt. The fact that a bank could not refuse to pay in the event of the receipt being lost, alluded to in *Re Dillon, Duffin v. Duffin, ubi supra*, does not affect the question, being merely an example of the exercise of the equitable jurisdiction with respect to lost instruments (k).

Apart from any question of the deposit being repayable on demand, at notice, or at a fixed period, it would seem clear that if the return of the receipt is by agreement of the parties, express or implied, made a condition precedent to withdrawal or repayment, garnishee proceedings will not lie against the deposit account. The *Joachimson Case* goes far in holding that service of the garnishee order nisi is equivalent to demand by the judgment debtor; it would, perhaps, be overstraining the effect of legal process to treat it as constructive substituted performance of another condition precedent, especially one involving the physical return of an actual document not in the possession of the judgment creditor.

SECTION 2.—LIABILITY TO ATTACHMENT

Apart from any question of the return of the receipt, the position seems to be as follows:

1. A deposit account withdrawable on demand or at call is probably attachable by a garnishee order (kk), on the analogy of other debts payable on demand, which are recoverable without previous actual demand, or by virtue of the judgment in the *Joachimson Case*.
2. A deposit account repayable on specified notice, with respect to which no such notice has been given at the time of the service of the order, is not affected by the order (l).

It is not at that time a debt due, for which the depositor could have immediately and effectually sued (m). The debt to be so attached must be a debt owing by the garnishee, a debt of which the judgment debtor could have compelled payment if he desired to do so.

It is not at that time a debt accruing due. There is no direct decision on this point. The accepted definition of

(j) [1893] 3 Ch. 154, at p. 157; 3 Digest 193, 402.

(k) See *Pearce v. Creswick* (1843), 2 Hare, 286; 3 Digest 192, 400.

(kk) See Halsbury's Laws of England, vol. i, p. 802.

(l) *Cowley v. Taylor, Ackers, Garnishees* (1908), 124 L.T. Jo., 569.

(m) Cf. *Chatterton v. Watney* (1881), 16 Ch. D., at p. 383; 21 Digest 629, 2124.

a “debt accruing due” is that given by the Court of Appeal in *Webb v. Stenton* (n), viz., *debitum in presenti solvendum in futuro*.

The examples given in *Jones v. Thompson* (o), and the fair interpretation of “accruing due” and of the above definition, show that the debt must be one payable at a definite approaching future date, which is not the case with a deposit withdrawable only on specified notice, where no such notice has been given.

3. Where due notice of withdrawal has been given prior to the service of the garnishee order *nisi*, then (subject, as already indicated, to any question of the return of the receipt or book) the deposit account is attached, because it is then a debt due or accruing due, according as the notice has expired or is still running.
4. A deposit account repayable at a fixed date is attached by a garnishee order (subject to any question as to return of the receipt or book), because it is a debt accruing due.

As in the case of a current account, where a garnishee order takes effect on a deposit account, the whole is attached, irrespective of the amount for which the judgment has been entered, unless, presumably, the order prescribes the attachment of a given sum only. It seems possible that where a receiver is appointed by way of equitable execution, a bank at which the judgment debtor had a deposit account might be brought into the proceedings, either on the application for a receiver or subsequently, and the order framed or a separate order made so as to affect the money in the hands of the bank. In *Giles v. Kruyer* (p), receivers were appointed by way of equitable execution on a judgment for £500 costs. The judgment debtor had a deposit account of £2300 at a bank. The order appointing receivers was served on the bank on 7th April 1919, but they were no party to the proceedings. The bank, not having heard anything more of the matter, on 4th December 1919 paid the whole £2300 to the judgment debtor. The receivers served the bank with a summons for an order that the bank should pay the receivers £500.

GREER, J., dismissed the summons. He said that the order appointing receivers, made in the absence of the bank, was *in personam* the judgment creditor only, not *in rem*, and operated only as an injunction to restrain the judgment creditor from receiving the money, not the bank from paying it. He quoted LORD ESHER in *Re Potts, Ex parte Taylor* (q) :

“If it (the order) had charged the money in the hands of the executors and had ordered them not to pay it to Potts, but to pay it to the receiver, although it might not create a common law charge, or

(n) (1883), 11 Q.B.D. 518 ; 21 Digest 625, 2107.

(o) (1858), E.B. & E. 63 ; 21 Digest 625, 2109.

(p) [1921] 3 K.B. 23 ; 21 Digest 673, 2527.

(q) [1893] 1 Q.B. 648 ; 21 Digest 671, 2508.

a charge within the meaning of any of the statutes which create charges, it might still perhaps amount to an equitable charge."

And he said that in the case before him the plaintiffs had had opportunity from April to December to apply for an order directly affecting the bank. See, however, *Payne v. French* (r), where the Court held that they had power to make an order attaching a deposit account, but not an order for its payment.

Effect of Limitation Act on deposit account

The Limitation Act is not likely ever to have effective operation on deposit accounts, as it would be barred by payment of interest. It was with immediate reference to the Statute of Limitations, 1623 (s), that LORD ESHER made the observations in *Atkinson v. Bradford Third Equitable Benefit Building Society*, above quoted. If the return of the deposit receipt be a condition precedent to repayment or recovery of the money, its return fixes the starting-point of the operation of the statute.

The best test as to when the statute begins to run is that laid down by WILLES, J., in *Garden v. Bruce* (t) :

"The six years must be six years on every day of which the plaintiff could have sued out a writ against the defendant."

The conditions before laid down concerning the application of a garnishee order *nisi* to a deposit account are, therefore, equally applicable for ascertaining the time at which the Limitation Act begins to run.

SECTION 3.—DEALING WITH DEPOSIT RECEIPT

It is the fairly general practice, nowadays, to issue deposit books, not receipts. These are in form a pass-book, but they must be returned before any withdrawal can be made. Nevertheless, receipts are still issued by Scottish and, to a less extent, English and Dominion banks, and thus the treatment and significance of these instruments is still of importance.

How far the depositor, by dealing with the deposit receipt, may entitle a third person to claim the money from the bank, or debar himself from disputing a payment thereon, is not very clear. It has been decided that a deposit receipt, *per se*, is not negotiable or even transferable (u). But in *Woodhams v. Anglo-Australian and Universal Family Assurance Co.* (v), STUART, V.C.,

(r) (1858), 10 Ir. Jur. 52.

(s) 21 Jac. I. c. 16.

(t) (1868), L.R. 3 C.P., at p. 301 ; 32 Digest 336, 203.

(u) *Cochrane v. O'Brien* (1845), 8 I. Eq. R. 241 ; 3 Digest 193, s ; *Moore v. Ulster Banking Co.* (1877), I.R. 11 C.L. 512 ; 3 Digest 195, 410 iv ; *Re Dillon, Duffin v. Duffin* (1890), 44 Ch. D. 76 ; 3 Digest 195, 411 ; *Pearce v. Creswick* (1843), 2 Hare, 286 ; 3 Digest 192, 400.

(v) (1861), 3 Giff. 238 ; 6 Digest 454, 2896.

held that a deposit receipt passed by delivery and required no assignment, and upheld a direct claim against the company by a third party on a receipt so delivered, free from any set-off against the original depositor. In *Re Griffin, Griffin v. Griffin* (w), indorsement and delivery of a deposit note was held to constitute a good equitable assignment, notwithstanding the fact that the receipt bore in two places the words "This receipt is not transferable".

The truth is that the deposit receipt itself, whether it says so on its face or not, is not transferable, certainly not negotiable. The mere passing it to another person has no effect in transferring the deposit account. But that which it represents, the money deposited, lent to the banker, is a debt or chose in action assignable like any other debt or chose in action, independent of the receipt and despite any restriction on the transferability of that receipt. As shown by *Re Griffin, Griffin v. Griffin*, even the receipt itself may be utilised as the basis of an equitable assignment. The same has been held where the receipt was indorsed "Pay my son". It makes no difference whether the debt is repayable at notice or at a fixed date, or that it cannot be claimed without returning the receipt. It is always there; always a chose in action, with the attributes of such, including assignability. When Courts use the expression that there is no debt till the return of the receipt, they mean that there is no enforceable debt, no immediate cause of action, not that the debt is non-existent till then. Whether the debt has been assigned or not, the banker is no doubt entitled to the return of the receipt if he has stipulated for it, but he is not entitled to refuse to accept it from the hands of an assignee, whatever its terms.

It does not seem the custom of banks to issue deposit receipts in a form inviting or authorising transfer; any bank so doing would probably be estopped from disputing their transferability and power to carry the deposit. If payable to bearer on demand, such receipt would probably constitute an infringement of the Bank Charter Act, 1844.

But payment to a third party on any form of deposit receipt alone is open to serious risk. Putting a regular transfer thereof as high as an equitable assignment, the mere possession of the deposit receipt, even indorsed by the depositor, is not conclusive evidence of such equitable assignment. Such possession is consistent with circumstances other than intentional assignment, in which case payment to the holder would not necessarily discharge the bank from liability to the depositor (y). A valid equitable assignment would, however, apparently constitute a good defence against a subsequent claim by the depositor (z).

(w) [1899] 1 Ch. 408; 6 Digest 454, 2899.

(y) Cf. *Evans v. National Provincial Bank of England* (1897), 13 T.L.R. 429; 3 Digest 193, 401; *Wood v. Clydesdale Bank, Ltd.* (1914) (Court of Session), "Journal of Institute of Bankers", vol. xxxiv, p. 441; 3 Digest 192, 400 *il.*

(z) See *per MAULE, J.*, in *Partridge v. Bank of England* (1846), 9 Q.B., at p. 413; 3 Digest 129, 49.

A deposit receipt not being a negotiable instrument, the bank is not entitled to exact an indemnity from the depositor before paying him, if he has lost the receipt.

Question as to stamp duty

Deposit receipts are exempt from stamp duty (a).

The Inland Revenue have sought to tax, as promissory notes not payable on demand, bankers' receipts for deposits for fixed periods, which specified the date at which the deposit would be repayable and the rate of interest allowed. Alternatively they have sought to charge them with stamp duty as agreements. Neither claim can be supported :

(a) The provision as to repayment does not render such documents promissory notes within s. 33 of the Stamp Act, 1891 (b), as containing a promise to pay a sum of money. The primary purpose of the document is something different ; and the promise to pay, if any, is only the recognition of a legal obligation resulting from the contract of loan (c).

See also *Horne v. Redfearn* (d), where it was held that the document would have been exempt as a deposit receipt, if given by a banker ; and *Mortgage Insurance Corporation v. Inland Revenue Commissioners* (e).

Nor does the provision as to payment of interest take the document out of the exemption.

In 1813, in *Bank of Scotland v. Watson* (f), the House of Lords declined to decide whether, under the then existing stamp laws, a proviso for payment of interest deprived the document of the character of a receipt. Consequent on this case, the Stamp Act of 1815 (Schedule, Part I) (g) expressly enacted that

" all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum importing that interest shall be paid for the money so deposited",

shall be deemed and taken to be promissory notes.

The repeal of that Act and the total omission of any such provision in the Stamp Act of 1891 show the intention of the legislature that the inclusion of interest should not for the future preclude such document from exemption as a receipt.

(b) Such a document is not chargeable with stamp duty as an agreement. See *Horne v. Redfearn* (supra), where the Court expressly stated that the document, which they held to be an

(a) Stamp Act, 1891, Sched. I (Receipts, Exemption 1) ; 16 Halsbury's Statutes 678.

(b) 16 Halsbury's Statutes 627.

(c) See per LORD M'LAREN, in *Thomson v. Bell* (1894), 32 Sc. L.R. 16 ; 6 Digest 497, o.

(d) (1838), 4 Bing. N.C. 433 ; 6 Digest 38, 270.

(e) (1888), 21 Q.B.D. 352 ; 6 Digest 497, 3150.

(f) (1813), 1 Dow, 40 ; 3 Digest 178, 323.

(g) 55 Geo. III. c. 184 ; 8 Halsbury's Statutes 47.

agreement, would, under the Stamp Act, 1815, have been exempt as a deposit receipt if given by a banker. Where, however, the receipt embodies a cheque form it probably requires a 2d. stamp on that form when signed.

Joint Deposits

A joint deposit account is in law simply a joint debt (*h*). Unless held under a mandate providing for either or any party to withdraw, where a deposit is in joint names both parties should combine in withdrawals. On the death of one, the fund in ordinary cases passes to the survivor. Where the joint depositors are husband and wife, and there is provision for withdrawal by either, and the wife is the survivor, it may be a question of intention whether the arrangement was merely for convenience during the joint lives, in which case survivorship would be excluded (*i*), or whether, beyond this, it was a method of providing for the wife, should she prove the survivor (*j*). This is the sort of question with which the banker ought not to be mixed up, and it is usually anticipated by the taking of a mandate providing for the disposal of the balance in the event of the death of any party.

It was in *McEvoy v. Belfast Banking Co., Ltd.* (*k*), that the position arising from the deposit by one person of money on joint account was fully discussed. That case decided that where A. deposits money with a bank in the names of himself and of B., payable to either or to the survivor, B.'s right to claim the deposit and to sue the bank depends on whether A. purported to make B. a party to the contract. If he did, he must either have had authority to act as his agent or B. must have ratified. In the above case, A., being mortally ill, deposited £10,000 with the respondents in his own name and that of his son. The deposit receipt expressed the sum to be repayable to either or the survivor. By his will A. directed his executors to hold the residue of his property in trust for B. until he reached the age of 25 years and on his attaining that age for him absolutely. On A.'s death the executors withdrew the money and redeposited it in their own names. Over a number of years this sum became exhausted through being paid into the overdrawn current account of A.'s business, which the executors carried on and in the management of which B. participated actively before and after he came of age. Soon after attaining the age of 25, B. claimed that he was entitled to the money and brought an action against the respondents to recover that sum as having been paid to the executors wrongfully and without his authority. The

(*h*) *Re Head, Head v. Head* (No. 2), [1894] 2 Ch. 236.

(*i*) *Husband v. Davis* (1851), 10 C.B. 645; 3 Digest 187, 371.

(*j*) See *Foley v. Foley*, [1911] 1 I.R. 281; *Williams v. Davies* (1864), 3 Sw. & Tr. 437; 3 Digest 190, 390; *Marshall v. Crutwell* (1875), L.R. 20 Eq. 328; 3 Digest 190, 391; and *Re Harrison, Day v. Harrison* (1920), 90 L.J. Ch. 186; Digest Supp.

(*k*) [1935] A.C. 24; Digest Supp.

members of the House of Lords all delivered judgments against B., but on differing grounds. Lord ATKIN'S opinion is perhaps of special interest :

" It is said that the effect of the contract created by the deposit of 10,000*l.* by the father in the names of himself and his son, the opening of the joint deposit account and the giving and acceptance of the deposit receipt was the formation of a contract between the father alone and the bank. Neither the father nor the bank, it is said, purported to contract for or with the son ; the son was a third party who could acquire no rights against the bank. It was as though the father had opened an account in his own name making the sums payable to himself or his son, in which case it was said the son would clearly have to prove an independent contract between himself and the bank before he could sue the bank. My Lords, this contention seems to me to raise the one question of general importance in the case. It involves the whole question of the legal relations created by a bank deposit in this form. The argument, if correct, appears to me inconsistent with well-established banking practice and likely to impair the confidence in deposits made in joint names. I consider it to be quite unfounded. It is, I think, significant that there appears no trace of such an argument having been put forward in the courts below. It would not have been attractive hearing for customers or potential customers of the bank in Belfast. It seems to have been reserved for the rarer atmosphere of your Lordships' House.

The suggestion is that where A. deposits a sum of money with his bank in the names of A. and B., payable to A. or B., if B. comes to the bank with the deposit receipt he has no right to demand the money from the bank or to sue them if his demand is refused. The bank is entitled to demand proof that the money was in fact partly B.'s, or possibly that A. had acted with B.'s actual authority. For the contract, it is said, is between the bank and A. alone. My Lords, to say that is to ignore the vital difference between a contract purporting to be made by A. with the bank to pay A. or B. and a contract purporting to be made by A. and B. with the bank to pay A. or B. In both cases, of course, payment to B. would discharge the bank whether the bank contracted with A. alone or with A. and B. But the question is whether in the case put B. has any rights against the bank if payment to him is refused. I have myself no doubt that in such a case B. can sue the bank. The contract on the face of it purports to be made with A. and B., and I think with them jointly and severally. A. purports to make the contract on behalf of B. as well as himself and the consideration supports such a contract. If A. has actual authority from B. to make such a contract, B. is a party to the contract *ab initio*. If he has not actual authority then subject to the ordinary principles of ratification B. can ratify the contract purporting to have been made on his behalf and his ratification relates back to the original formation of the contract. If no events had happened to preclude B. from ratifying, then on compliance with the contract conditions, including notice and production of the deposit receipt, B. would have the right to demand from the bank so much of the money as was due on the deposit account.

In my view, therefore, if nothing had happened to prevent the son from ratifying the contract, he could sue the bank on the original deposit account. It would be no answer to say that the bank had paid the executors, for the contract was not to pay to the executors of either of the two names, but to the survivor. I think the case is rightly put on ratification, for I can find no sufficient evidence that the father had the actual authority of the son to enter into this contract on the son's behalf."

The other members of the House were of opinion that the

money deposited passed to the executors with the rest of A.'s estate and that they were entitled to receive and apply it in due course of administration as directed by the testator's will. They therefore considered it unnecessary to discuss the position of the son in relation to the contract with the bank.

Where there is a deposit in the joint names of husband and wife, with power for either to withdraw, and notice is received by the bank that the husband is confined in a lunatic asylum, it would not be safe to allow the wife to withdraw the amount. The effect of lunacy on contractual relations is the same as that of death (1).

In *Hirschorn v. Evans* (m), the Court of Appeal (GREER, L.J., dissenting on the point of law) held that a joint banking account could not be attached by a garnishee order founded on a judgment given against one party only to the account.

On the bankruptcy of the depositor the amount on deposit vests in the trustee as from the act of bankruptcy, but presumably the banker would be protected under s. 46 of the Bankruptcy Act, 1914 (n), if he paid out the money to the depositor before a receiving order was made and without notice of a petition having been presented.

(1) *Per* LAWRENCE, J., in *Bradford Old Bank, Ltd. v. Sutcliffe* (1918), 34 T.L.R. 299; confirmed on appeal, but this point not mentioned, [1918] 2 K.B. 833; 3 Digest 264, 809.

(m) [1938] 2 K.B. 801; [1938] 3 All E.R. 491; Digest Supp.

(n) 1 Halsbury's Statutes 651.

CHAPTER 7

CHEQUES GENERALLY

SUMMARY—

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SECTION 1.—BY WHOM MUST BE DRAWN

Definition

"A CHEQUE is a bill of exchange drawn on a banker payable on demand" (a).

Not necessarily drawn by a customer

Sir Mackenzie Chalmers says (aa) :

"It is no part of the definition that a cheque should be an inland bill, or that it should be drawn by a *customer* upon his banker."

In *Ross v. London County Westminster and Parr's Bank, Ltd.* (b), BAILHACHE, J., held to be a cheque a draft drawn by one branch of a bank on another branch of the same bank. This decision was obviously wrong, though such instruments, when crossed, are now assimilated to cheques by the Bills of Exchange Act (1882) Amendment Act, 1932 (bb); it was confirmed by FINLAY, J., in *Slingsby v. Westminster Bank, Ltd.* (c).

It is somewhat difficult to contemplate a cheque not drawn by a customer, and there are expressions in the other cheque sections which it is not easy to reconcile with the existence of any different class of cheque. Moreover, until the decision in *London City and Midland Bank, Ltd. v. Gordon* (cc), there was a canon of construction that where an Act of Parliament speaks

(a) Bills of Exchange Act, 1882, s. 73; 2 Halsbury's Statutes, 73.

(aa) 10th ed. 1932, p. 291.

(b) [1919] 1 K.B. 678; 6 Digest, 35, 242.

(bb) 25 Halsbury's Statutes, 63.

(c) [1931] 1 K.B. 173; Digest Supp.

(cc) [1903] A.C. 240; 6 Digest 35, 241.

of a banker, it means a banker acting in his capacity as such, in correlation with a customer. There was also the canon of construction, expressly recognised by the Court of Appeal in the *Gordon Case* (*d*), and in *Charles v. Blackwell* (*e*), that all statutory provisions for the protection of the banker are designed to counteract some risk imposed on him, directly or indirectly, by legislation in the interest of the community, and must not be extended beyond the limits required for that purpose. These two eminently reasonable rules overlap with regard to the matter in hand; they are accordingly treated together here.

Bankers' drafts

In the *Gordon Case*, some of the documents involved were bankers' drafts, drawn by the A. branch of a bank upon its head office, payable to G. and M. or order. These were issued by the A. branch to a customer who forwarded them to G. and M. They were intercepted by J., who forged the indorsement of G. and M. and paid them uncrossed into his own account at the B. branch of the same bank.

The House of Lords held that these documents were not cheques or bills within s. 3 of the Bills of Exchange Act (*f*), there being no separate drawer and drawee, and that the power given by s. 5, sub-s. 2 (*g*), to treat as a bill a document in which drawer and drawee are the same person is confined to the holder, as indeed it is, in terms. They therefore held that the bank was not protected by s. 60 of the Bills of Exchange Act (*h*).

Stamp Act, 1853, s. 19

But they did hold that the bank, as paying bank, was protected by s. 19 of the Stamp Act, 1853 (*i*), which is as follows :

"... any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was, or is, made payable, either by the drawer or any indorser thereof."

Now one would have said that the wording of this section was expressly designed to confine its operation to drafts or orders drawn on a banker *qua* banker, that is, by a customer. There is first the use of the word 'banker', which, as before suggested, seems to imply the relation to a customer (*j*).

(*d*) [1902] 1 K.B. 242.

(*e*) (1877), 2 C.P.D. 151; 3 Digest 237, 665.

(*f*) 2 Halsbury's Statutes 36.

(*g*) 2 Halsbury's Statutes 38.

(*h*) 2 Halsbury's Statutes 66.

(*i*) 1 Halsbury's Statutes 543.

(*j*) And see *Halifax Union v. Wheelwright* (1875), L.R. 10 Exch., at p. 193; 3 Digest 172, 295.

"Shall be a sufficient authority"

In their ordinary acceptance these words point to the relation of banker and customer. A man wants no authority to pay a bill drawn on him as a principal; a banker does want authority to pay away his customer's money (*k*). But in *Charles v. Blackwell* (*l*), the Court, in order to secure to the banker protection against the true owner, as well as the customer, read these words as implying a statutory authority derived from the section. This interpretation seems somewhat forced, but justified by the necessities of the situation.

"It shall not be incumbent on such banker to prove that such indorsement . . ." etc.

These words are unintelligible, except with relation to a customer's drafts. An ordinary drawee or acceptor pays a bill on his own account; there is no one to whom he looks for reimbursement, no one he can debit. If he pays on a forged indorsement, he has to bear the loss himself unless he can recover the money as paid under mistake of fact from the person he paid it to. There is no conceivable state of circumstances in which there is any duty from him to anybody, rendering it incumbent on him to prove an indorsement to be genuine. Even where he is sued by the true owner for conversion of the bill, it is incumbent on the true owner to prove that his signature was forged, not on the drawee or acceptor to prove it genuine. The words can therefore apply only to a state of facts in which, but for this section, it would be incumbent on the banker, as drawee, to justify his conduct by proving an indorsement to be genuine. That state of facts is where he has paid a customer's draft out of that customer's money. To entitle him to debit the customer, it would be incumbent on him to show that he had paid with the customer's authority, in accordance with his mandate. If the customer said "Pay A. or order", and the banker has paid somebody purporting to hold under A.'s indorsement, it would be incumbent on the banker to prove to his customer that the person fulfilled the character of A.'s order; in other words, to prove the genuineness of A.'s indorsement.

No doubt, in the *Gordon Case*, these drafts were in a sense drawn on the banker as such, and were issued to a customer; but they were issued by the branch to its customer and paid by the head office, where he was not a customer, and had no account which could be debited. No point, moreover, was made of this in the judgment, which would be equally applicable had the drafts been sold to a perfect stranger.

(*k*) Cf. s. 75 of the Bills of Exchange Act; 2 Halsbury's Statutes 73.
(*l*) (1877), 2 C.P.D., at p. 159; 3 Digest 237, 665.

As affecting the Bills of Exchange Act, 1882

There is nothing in the definition of 'banker' in s. 2 of the Bills of Exchange Act (*m*) sufficient to differentiate its meaning in that Act. It must therefore be recognised that this decision affects that Act as well, and that it can be no longer asserted that 'banker', either in the Bills of Exchange Act or the Stamp Act, 1853, necessarily means a banker in relation to a customer.

Correlative risk and protection

Again, this decision militates against the other canon of construction referred to, viz., that all statutory protection to a banker is based on, and must be confined to, the counteracting some additional risk directly or indirectly thrust upon him by the legislature in the interest of the community at large.

Section 19 of the Stamp Act, 1853, like ss. 60 and 82 of the Bills of Exchange Act, 1882 (*n*), has generally been regarded as a leading example of this principle and interpreted on those lines.

Lord Lindley, in *Gordon's Case*, and the Court of Appeal in *Charles v. Blackwell* (*o*), set forth the facts relating to its introduction. It was inserted in the Stamp Act, 1853, because that Act first authorised the issue of "draft or order for the payment of any sum of money to the bearer or to order", with a 1d. stamp, that rate of stamp duty having previously been confined to such documents when payable to bearer, not to order. As the Court say in *Charles v. Blackwell* (*p*), with reference to this very section :

"Now the purpose of the enactment we are dealing with was, when cheques payable to order were expected to become general, to protect bankers against the possibility of forged indorsements. The only reason why cheques had not been drawn payable to order before being, as I have stated, the expense of the stamp. When the Stamp Act of 16 & 17 Vict. included these cheques among those which should be subject to the penny stamp, it was of course foreseen that the great convenience arising from the use of such cheques would make them of constant recurrence. It was equally certain that the use of cheques drawn to order would expose bankers to serious danger from forged indorsements, payment upon which, as the law then stood, would have been to their own loss. It was against this danger that the 19th section of the Act was intended to protect them. . . . It was not unreasonable, therefore, that while the customer obtained the advantage of being able to draw cheques payable to order, the possibility of forged indorsements should be, as between him and the banker, at his risk."

Here not only is the section treated as applying solely to the case of cheques drawn by a customer on his banker, but the protection is limited to such cases, and the reason for such limitation assigned on the basis above stated. And the main principle is recognised in the judgments in *Gordon's Case* in

(*m*) 2 Halsbury's Statutes 35.

(*n*) 2 Halsbury's Statutes 66, 76.

(*o*) (1877), 2 C.P.D. 151 ; 3 Digest 237, 665.

(*p*) (1877), 2 C.P.D., at p. 156.

the House of Lords with reference to s. 77, sub-s. 6, and s. 82 of the Bills of Exchange Act, 1882 (g). But by extending the protection to drafts drawn by a branch office of a bank on a head office, the House of Lords would appear to have disregarded this correlation of risk and protection.

It was not and could not be suggested that the Stamp Act of 1853 produced or was likely to produce a large increase in the number of such drafts issued by banks. But there is a far stronger consideration. On the passing of that Act, the payment of an order cheque drawn on a banker by his customer, with a 1d. stamp, became a legal obligation on the banker, provided he had available and sufficient funds in his hands. He was responsible to the customer in damages if he did not pay it. This duty was the foundation of the risk and the limit of the protection. But the issue of a draft such as that in question, even to a customer, remained, and remains, a matter entirely at the option of the banker. The customer cannot draw it himself, or insist on the banker giving it to him. Therefore such drafts, being purely voluntary and optional on the part of the banker, were, before the passing of the Bills of Exchange Act (1882) Amendment Act, 1932, altogether outside the reason of the protection against forged indorsement.

The fact is that in 1853 "draft or order drawn upon a banker" was synonymous and alternative with 'cheque' which gradually superseded it (r). It is so treated in the above citation from *Charles v. Blackwell*, which was in 1877. Sir Mackenzie Chalmers says that this section of the Stamp Act of 1853 was not repealed by the Bills of Exchange Act because it was thought it might apply to drafts or orders other than bills (s). It was never meant to apply to anything but what are now cheques drawn by a customer, but it is not for bankers to complain of its retention and application to drafts other than bills and cheques. That this is the limit of its application appears from the case of the *Carpenters' Co. v. British Mutual Banking Co., Ltd.* (t).

Bearing on s. 60 of the Bills of Exchange Act

The effect of the decision cannot be imported into s. 60 (u), for the reason that the latter deals only with "a bill payable to order on demand drawn on a banker," and a bill requires separate persons as drawer and drawee. The rule as to correlation of risk and protection may be regarded as still obtaining, except with respect to this particular section of the Stamp Act, 1853, since, as above stated, it was distinctly affirmed by the House of Lords with regard to certain sections of the Bills of Exchange Act, in the same judgments.

(g) 2 Halsbury's Statutes 75, 76.

(r) See *Encyclopædia Britannica*, title "Cheque".

(s) *Chalmers' Bills of Exchange*, 10th ed., p. 400.

(t) [1938] 1 K.B. 311; [1937] 3 All E.R. 811; Digest Supp.

(u) 2 Halsbury's Statutes 66.

SECTION 2.—REQUISITES IN FORM (v)

Requisites in form of a cheque

In addition to being drawn on a banker, a cheque must conform to the requisites laid down by the Bills of Exchange Act as necessary to constitute a bill. Under s. 3 (1) (w) it must be

“an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer.”

For the general interpretation of this section see *Chalmers' Bills of Exchange* (x).

There are a variety of documents to which statute has annexed some of the attributes or facilities of cheques, particularly that of being effectively crossed, but which are debarred by peculiar characteristics from being included in the general law as to cheques. These will be dealt with at the end of this chapter, and incidentally elsewhere.

The following are the points of the above definition of a cheque which specially affect bankers :

1. Must be unconditional

The documents which require as a condition of payment the signing a particular form of receipt are, therefore, not cheques (y). Where the condition is not imposed on the drawee or banker, but is only addressed to and affects the payee or holder, this does not make the cheque conditional (z).

The distinction is a somewhat shadowy one. If the direction is contained in the body of the instrument and runs in terms such as

“Pay _____ on the attached receipt
being duly signed”,

this is addressed to the drawee and makes the document conditional ; if it takes the form of a note as

“This receipt must be signed before presentment for payment”,

that is taken to be addressed to and affect only the payee and does not impair the unconditional nature of the cheque. The

(v) For forms of cheques, see *Encyclopaedia of Forms and Precedents*, 3rd ed., vol. ii, pp. 458 *et seq.*

(w) 2 Halsbury's Statutes 36.

(x) 10th ed., 1932, p. 10.

(y) See *Bavins, Junr. and Sims v. London and South Western Bank*, [1900] 1 Q.B. 270 ; 3 Digest 243, 693 ; *Capital and Counties Bank, Ltd. v. Gordon*, [1903] A.C. 240 ; 3 Digest 200, 454.

(z) *Nathan v. Ogdens, Ltd.* (1905), 94 L.T. 126 ; 12 Digest 463, 3764 ; *Thairwall v. Great Northern Railway Co.*, [1910] 2 K.B. 509 ; 6 Digest 15, 54 ; *Roberts & Co. v. Marsh*, [1915] 1 K.B. 42 ; 6 Digest 15, 55. In the last-named case, *Roberts & Co. v. Marsh*, the word 'drawee' should read 'payee' throughout. See errata at beginning of the volume.

ground is that it is only the *order* on a bill or cheque which must be unconditional under s. 3 of the Bills of Exchange Act (a). But such a note, even if not directly addressed to the banker, is calculated to catch his eye, and if the cheque were presented with the receipt unsigned, the customer might say it was part of his instructions to the banker not to pay it in that condition. However, there are relatively few cases nowadays in which the banker does not take a mandate which puts the position beyond doubt, by requiring the banker to pay only if the receipt is completed by signature and stamping.

It is somewhat strange that the signature of any receipt by the payee should not be held inconsistent with someone else receiving the money which the payee states he has, but has not really, received. This, however, appears to have been treated as immaterial, probably on the theory that the money is received by the payee either from his transferee or by that transferee as his agent.

Receipt as indorsement

A not uncommon form is for an order cheque with receipt attached to bear a memorandum to the effect that the receipt must be signed by the person to whom it is made payable, no further indorsement being necessary. Even if the requirements as to signature of the receipt are not such as to make the cheque conditional, it is submitted that such signature cannot serve the double purpose of receipt and indorsement—it is not made solely *animo indorsandi*, or delivered as an indorsement—and that a banker paying it runs the risk of liability in case the signature is a forgery, and that, if crossed, the collecting banker is outside s. 82 (b).

For further treatment of cheques with receipts attached, see the later part of this chapter.

To be unconditional a cheque must not be made payable out of a particular fund (c).

2. Must be an order

A cheque must be an order. As Sir Mackenzie Chalmers puts it, it must be imperative in its terms, not precative, though the insertion of mere terms of courtesy will not make it precative (cc).

3. Addressed by one person to another

A cheque must be addressed by one person to another. There must be one person as drawer, another as drawee (d).

(a) 2 Halsbury's Statutes 36.

(b) 2 Halsbury's Statutes 76.

(c) Bills of Exchange Act, s. 8, sub-s. 3; 2 Halsbury's Statutes 39.

(cc) Chalmers' Bills of Exchange, 10th ed., p. 14.

(d) *Vagliano Brothers v. Bank of England* (1889), 23 Q.B.D., at p. 248, C.A.; *London City and Midland Bank, Ltd. v. Gordon*, [1903] A.C. 240; 3 Digest 243, 694.

The head office and branches of a bank constitute for general purposes only one concern or legal entity (*e*). It is for this reason that drafts drawn by one branch of a bank on another branch or the head office, although held to be “drafts or orders drawn upon a banker”, within s. 19 of the Stamp Act, 1853 (*f*), are not cheques or bills drawn on a banker so far as the bank is concerned (*g*). By the Bills of Exchange Act (1882) Amendment Act, 1932, however, bankers’ drafts are assimilated to cheques for purposes of the crossed cheques sections of the parent Act.

Section 5, sub-s. 2, of the Bills of Exchange Act (*h*), which enacts that

“where in a bill drawer and drawee are the same person, . . . the holder may treat the instrument at his option either as a bill of exchange or as a promissory note”,

and in a minor degree s. 50, sub-s. 2 (*c*) (*j*), certainly appear to contemplate the possibility of a bill in which drawer and drawee are the same person. The true interpretation of those sections is, however, that though such a document is not really a bill, the holder may treat it as such (*k*), but even then need not give notice of dishonour to the drawer. The right so to treat it is, in any event, confined to the holder, and cannot help the bank (*l*).

4. On demand

A cheque must be payable on demand. The omission of the words ‘on demand’ in the ordinary cheque form is justified by s. 10 of the Bills of Exchange Act (*m*), which provides that “a bill is payable on demand

- (a) which is expressed to be payable on demand or at sight or on presentation, or
- (b) in which no time for payment is expressed”.

There is a clause frequently occurring in dividend warrants and like documents issued by companies, in other respects conforming with the requisites of a cheque, which raises the question whether they are not defective, as not being payable on demand, or as being conditional.

(*e*) *Prince v. Oriental Bank Corporation* (1878), 3 App. Cas. 325; 3 Digest 173, 301.

(*f*) 1 Halsbury’s Statutes 543.

(*g*) *London City and Midland Bank, Ltd. v. Gordon*, [1903] A.C. 240; 3 Digest 239, 670.

(*h*) 2 Halsbury’s Statutes 38.

(*j*) 2 Halsbury’s Statutes 61.

(*k*) See *per GREER, L.J.*, in *Re British Trade Corporation, Ltd.*, [1932] 2 Ch., at p. 11, and *per ROMER, L.J.*, at p. 14; Digest Supp.

(*l*) *London City and Midland Bank, Ltd. v. Gordon*, [1903] A.C. 240; 3 Digest 240, 676.

(*m*) 2 Halsbury’s Statutes 40.

In *Thairlwall v. Great Northern Railway Co.* (n) the defendants sent to the plaintiff by post a dividend warrant in the following form :

Union of London and Smiths Bank,
No. 2, Princes Street, London.

Pay to the order of

The sum of

£ .

E. H. BURROWS, *Secretary*.

Signature of Payee.

Note.—This warrant must be signed by the person to whom it is payable, and presented for payment through a banker. It will not be honoured after three months from date of issue unless specially indorsed by the Secretary.

It was crossed generally. It was lost in the post and never reached the plaintiff. It had not been presented by anybody. Payment was stopped at the bankers. Plaintiff wrote asking for a duplicate warrant. The defendant company agreed to give one on plaintiff signing the usual indemnity. This he refused to do, and sued the company for the amount of the half-year's dividend declared on the stock held by him.

Three of the points relied on by the plaintiff were :

1. that the document sent was not a dividend warrant, which must be a cheque, *i.e.*, an unconditional order in writing on a banker payable on demand ;
2. that the document was not unconditional, because it would not be paid unless presented within three months from date of issue ;
3. that the document not being a negotiable bill, the giving it was no defence to an action for the debt for which it was given.

BRAY, J., decided in favour of the defendants on the ground that the only obligation on the company was to send a dividend warrant, which they had done. But he said :

"A dividend warrant, it was said, must be a cheque, and the document sent was not a cheque, because it had this condition at the bottom of it : 'It will not be honoured after three months from date of issue unless specially endorsed by the secretary'. I have felt a great deal of doubt on this point because of this statement. But I incline to think that this document is an unconditional order in writing drawn on a banker and payable on demand, signed by the person giving it, requiring the person to whom it is addressed to pay on demand a sum certain in money ; and is therefore a cheque within the meaning of ss. 73 and 3 of the Bills of Exchange Act, 1882 (o). And I think it is none the less a cheque because of that statement at the bottom of the document. I do not regard that statement as making the order conditional."

(n) [1910] 2 K.B. 509 ; 6 Digest 15, 54. (o) 2 Halsbury's Statutes 73, 36.

COLERIDGE, J., said :

" In my opinion those words have not the effect claimed for them of making the warrant other than an unconditional order for payment. I regard them merely as a definition by the directors, acting under the authority of the stockholders, as to what shall be a reasonable time within which the warrant must be presented, having regard to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. A cheque is none the less a bill of exchange within the Act because by s. 74 (p) the drawer may be discharged if the cheque is not presented within a reasonable time, regard being had to the same considerations. These warrants are not made less unconditional than other cheques by having these words at the foot of them, which merely give notice that the directors have fixed three months as a reasonable time within which the warrants must be presented, and after which, if the warrants have not been presented, inquiries will have to be made before the holder receives payment."

It is not easy to see on what ground it was contended that a dividend warrant must necessarily be a cheque. Section 95 and s. 97 (3) (a) appear to contemplate the contrary (q). On the main point, the effect of the note, the judgments are not very convincing. BRAY, J., admits considerable doubt on the matter, while the judgment of COLERIDGE, J., seems based on a misapprehension.

Section 45 (2) (r) governs the rights and liabilities of the drawer and indorsers of a bill payable on demand, other than a cheque, and of the indorsers of a cheque.

Position of drawer

No doubt the drawer of a cheque is technically the drawer of a bill payable on demand, and so primarily within this section. But his actual position is different. The drawer of a bill on demand other than a cheque anticipates, and has a right to anticipate, that the bill will be met by the drawee out of his, the drawee's, own moneys, he, the drawer, having presumably given consideration for the bill. Although the bill on demand is seldom, if ever, accepted, and the holder has therefore no claim on it against the drawee if he does not pay on presentment, the idea is that the drawer is in some way or other a quasi-surety, and so entitled to know his liabilities within a reasonable time.

That is not the case with the drawer of a cheque. He knows the banker will not pay unless he has money of his, the drawer's, to pay with. He has no recourse, as the drawer of a bill on demand would have, against the drawee, not on his acceptance, because he would not have accepted, but on the undertaking to pay or the consideration for which the bill was drawn. The drawer of a cheque is for all practical pur-

(p) 2 Halsbury's Statutes 73.

(q) 2 Halsbury's Statutes 80.

(r) 2 Halsbury's Statutes 56.

poses the person ultimately and, in the absence of subsequent indorsements, primarily, liable on the cheque, and he has no remedy over on the cheque or otherwise against anyone. He is therefore bound to keep money at his banker's to meet the cheque whenever presented, and it would be unfair if, by reason of delay in presentation of the cheque, he should suffer loss of the money he was keeping at the banker's to meet it. That is the whole scope of s. 74 (s). It only relieves the drawer where, by reason of failure of the banker, he has lost the money which he is presumed to have left in the banker's hands to meet the cheque, or some of it.

Section 74 takes the drawer of a cheque out of s. 45 altogether. Section 74 certainly says, "subject to the provisions of this Act", but s. 45 also says "subject to the provisions of this Act". Presumably this makes the effect nil either way. But s. 45 (2) says, "Where a *bill* is payable on demand"; s. 74 says, "Where a *cheque* is not presented". This may be intended to turn the scale.

No doubt s. 74 (2) provides, as COLERIDGE, J., says, that, in determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and bankers, and the facts of the particular case. The 'instrument' is, of course, the cheque; this is a sub-section of a section of a group of sections dealing exclusively with cheques, and must therefore be confined to such instruments (r), while s. 45 deals with *bills* on demand. The nature of a cheque is that it is intended for speedy presentment, not, like a promissory note payable on demand, to serve as a continuing security.

Therefore s. 74 is the ruling enactment as to cheques, excluding the drawer from the operation of or any right under s. 45. Therefore, save in the special circumstances contemplated by s. 74, viz., the failure of the banker having funds of the drawer in hand after reasonable time for presentation of the cheque has elapsed, the drawer's liability enures for six years from issue of the cheque (u).

What, therefore, the note on the warrant in *Thairlwall v. Great Northern Railway Co.* (v) means is this :

I, the drawer, will not be liable on this cheque and I do not order my bankers to pay it on demand unless presented within three months from issue.

Normally a cheque is payable on demand at any time within six years of issue. No doubt bankers decline to pay a cheque they term stale, that is, one not presented within periods varying from six months to a year after issue; but it has never been suggested that this releases the drawer. It is

(s) 2 Halsbury's Statutes 73.

(r) Cf. *Ingalls v. Robertson and Baxter*, [1898] A.C. 616; 1 Digest 334, 489.

(u) Cf. *Laws v. Rand* (1857), 3 C.B.N.S. 442; 6 Digest 228, 1436.

(v) *Ante*, p. 108.

simply dishonoured, though the drawer might not be able to sue the banker for damage to credit, the refusal to pay being justified by the custom of bankers. Moreover, the period fixed by the note in this case was materially shorter than any recognised by bankers.

The importation of the usage of trade and of bankers and the facts of the particular case in s. 74 is clearly and absolutely confined to the circumstances and contingency contemplated in that section, namely, the failure of the banker having funds of the drawer in his hands. It has nothing to do with the ordinary case of a cheque, so far as the drawer thereof is concerned. Nor has the drawer any possible authority to usurp the functions of trade and bankers, nor is what he writes on the cheque one of the facts in the particular case. The whole thing is, of course, a shocking piece of legislation; but s. 74 remedied a still worse condition of the law by which, in such circumstances as are dealt with by that section, the drawer was absolutely discharged, although the bank might ultimately pay nineteen shillings in the pound.

In view of what has been said above, it is submitted that a cheque which is only payable on demand for three months instead of the normal six years is not 'payable on demand' within the meaning of s. 3 (w). This point was not decided in *Thairwall v. Great Northern Railway Co.* (x). As will be seen from the citation above, the Court went on the question whether the note made the cheque conditional. They did not, apparently, consider whether it was addressed to the banker or only to the payee.

So far as the 'payable on demand' point is concerned, this question does not arise; it only comes in when it is the 'order' which is involved; if on any basis the cheque is not 'payable on demand', it is not a cheque; it must be 'drawn . . . payable on demand'. But it may well be doubted whether such an intimation as 'it will not be honoured unless presented within three months' could be regarded as having no reference to or significance for the banker, although conveyed in a note.

However, there is the decision of a divisional Court, and so long as it stands bankers will be safe in acting upon it, and treating such instruments as ordinary cheques up to the three months' limit or other limit imposed.

It is understood that the Inland Revenue authorities treat them as payable on demand for stamp purposes.

Post-dated Cheques

Post-dated cheques are, in a sense, not payable on demand. They are cheques issued on one date, dated on the face of them a subsequent one, before which they will not be paid, if the ostensible date is noticed.

(w) 2 Halsbury's Statutes 36.

(x) *Anta*, pp. 108, 109.

The whole subject is a distasteful, and should be an unnecessary, one. It is difficult to discover any valid reason for the existence or toleration of these anomalous documents. Many reasons to the contrary are obvious.

The man who issues a post-dated cheque gets exactly the same results as a man who gives a bill payable at the same date, with the difference that he borrows the money or postpones the debt at the cost of a twopenny stamp, instead of the *ad valorem* duty stamp he would otherwise have to pay if the amount were over ten pounds. The Revenue, or the community, is poorer by the difference, a difference increasing with the amount of the cheque.

Doubtless, to inexperienced borrowers, the post-dated cheque is less formidable than the formal bill. Post-dated cheques are habitually in use in the lower circles of business life, facilitating transactions of dubious financial soundness; while to the banker they are a perpetual source of annoyance and possible loss. The only deterrent is the extremely problematical possibility of a penalty on the drawer under s. 5 of the Stamp Act, 1891 (y) (see *Chalmers*, 10th ed., p. 407), which has never been, so far as can be ascertained, put in operation. In *Royal Bank of Scotland v. Tottenham* (z), there are some remarks by KAY, L.J., which tend to negative the applicability of any penalty to the drawer.

Somewhat unaccountably, the post-dated cheque has received a large measure of sanction and encouragement from the legislature and its administrators. Section 13 (2) of the Bills of Exchange Act (a) expressly provides :

"A bill is not invalid by reason only that it is ante-dated or post-dated . . ."

A whole series of cases establish its validity and perfect capacity for negotiation between the real date of its issue and its ostensible date, and presumably for a reasonable time after that (b). No objection to the stamp can be taken on any legal proceedings; such objections only apply to a stamp as it appears at the trial; the trial would necessarily be after the ostensible date, so the stamp would be quite in order (c).

A strange question might arise if the indorsee of a post-dated cheque indorsed to him before its ostensible date sued his indorser, and that indorser set up the defence that the cheque was not presented within a reasonable time after indorsement. Section 45 (d) provides that a bill payable on

(y) 16 Halsbury's Statutes 619.

(z) [1894] 2 Q.B. 715, at p. 719; 3 Digest 204, 473.

(a) 2 Halsbury's Statutes 41.

(b) See *Hitchcock v. Edwards* (1889), 60 L.T. 636; 6 Digest 53, 403; *Carpenter v. Street* (1890), 6 T.L.R. 410; 6 Digest 53, 404; *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q.B. 715; 6 Digest 53, 405; *Robinson v. Benkel* (1913), 29 T.L.R. 475; 6 Digest 53, 406.

(c) See *Royal Bank of Scotland v. Tottenham*, *ubi supra*.

(d) 2 Halsbury's Statutes 55.

demand must be presented within a reasonable time after indorsement in order to charge the indorser. Section 13 (e) says,

“Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.”

The indorsement presumably is not dated; the indorser could readily show that the indorsement by him was prior, it might be long prior, to the ostensible date of the cheque, which would not be presented before that ostensible date, and contend forcibly that a reasonable period had elapsed between his indorsement and presentation for payment. The only answer would seem to be that the post-dating extends the reasonable time. The drawer could not take up this line with regard to issue, by reason of s. 74 (f), as previously explained, unless the banker had failed, and there might be other answers to him.

Not payable before date

The question has often been asked why such a cheque, being, on the face of it, payable on demand, is not really so payable, despite the post-dating. The recognition of post-dating by statute and authority points the other way. Anyhow the banker is not concerned in the matter; his business is not to pay it before the ostensible date, that being his customer's intention and direction; if the holder wishes to raise the point, he can only do so with the drawer. The real trouble is where a banker inadvertently pays a post-dated cheque before the ostensible date. He cannot debit it then, and he must not dishonour cheques presented in the interval up to the ostensible date, which, but for paying the post-dated one, he would otherwise have paid. If he pays these and the cheque is not stopped, when the ostensible date arrives he presumably debits the account, though it might fairly be argued that he was not in any event entitled to do so, having paid contrary to his customer's orders, the same as if he had paid a crossed cheque over the counter other than to a banker. But if the cheque is stopped, or at the ostensible date there is no credit balance to meet it, the banker's position is bad, and he stands to lose the money.

Efforts have been made to get out of the difficulty by representing the banker as having purchased the cheque during its currency, and so, being a holder in due course, entitled to sue the drawer. It may well be that payment by drawee or acceptor before maturity operates as a money purchase of the instrument (g). But in *Morley v. Culverwell*, PARKE, B., said :

(e) 2 Halsbury's Statutes 41.

(f) 2 Halsbury's Statutes 73.

(g) See *Morley v. Culverwell* (1840), 7 M. & W., per PARKE, B., at p. 182; 6 Digest 357, 2358; *Attenborough v. Mackenzie* (1856), 25 L.J. Ex. 244; 6 Digest 357, 2360.

"If the acceptor pays a bill before it is due to a wrong party he is not discharged. It has been so held in the case of a banker's cheque payable to bearer; if the banker pays it before it is due he is not protected."

The case he refers to and cites is *De Silva v. Fuller* (h). In that case a post-dated bearer cheque was lost and was paid by the banker on the day before that it was dated. Held, that the banker was not protected and must repay the loser. With a bearer cheque there could be no question of paying the wrong person.

There seems also to be a difference between payment intended as a discharge, as under s. 61 (i), even under mistake, and payment made, even by a party to the bill, with a view to becoming holder, as under s. 59 (j).

In *Pollard v. Ogden* (k), a banker paid a bill, accepted payable at his bank, of which he was also an indorser. The question was left to the jury whether he paid it as banker or indorser. This test would probably defeat the claim of the banker who was not an indorser to the position of holder in due course. The banker is the customer's agent to pay cheques; he cannot act as principal in relation thereto. Further, he would be met by the argument that the customer had ordered him to pay this particular cheque to another person, and he was bound to obey that order. This seems to have been recognised in *Morley v. Culverwell*, where the point was raised by counsel as distinguishing the case of the banker paying a post-dated cheque prematurely.

In *Emanuel v. Roberts* (l), a post-dated order cheque was presented for payment before the ostensible date; payment was refused and the cheque marked 'Post-dated'. It was presented again on the ostensible date and payment again refused. In an action by the customer for damage to his credit, the bank was held justified by virtue of a custom of London bankers to refuse payment of an order cheque which they knew to have been post-dated.

The custom was recognised as reasonable on the ground of the then existing doubts as to the legality of such post-dated cheques. In face of their distinct recognition by the Bills of Exchange Act and later decisions, such custom could not be supported now, the ground for it having disappeared, and a banker is bound to pay a post-dated cheque presented on or after its ostensible date even though he may have refused payment of the same cheque before and marked it post-dated, when presented before that date. And he runs no risk in so doing. As long ago as 1883, the Inland Revenue informed

(h) (1776), unreported but reproduced in *Bayley on Bills*, 5th ed., 326; *Chitty on Bills of Exchange*, 11th ed., p. 188.

(i) 2 Halsbury's Statutes 67.

(j) 2 Halsbury's Statutes 66.

(k) (1853), 2 E. & B. 459; 3 Digest 228, 620.

(l) (1868), 9 E. & S. 121; 3 Digest 213, 531.

Messrs. Holt & Co. that they incurred no penalty by paying post-dated cheques known to be such.

When a post-dated cheque is sent to a banker for collection before the ostensible date, the banker either presents it at once or advises his customer that he is holding it for instructions or the arrival of the due date. If he lets the customer draw against it he becomes holder in due course and could sue on the cheque after the ostensible date, if dishonoured.

5. "To or to the order of a specified person or bearer"

A cheque must be payable to or to the order of a specified person or to bearer.

Bills, notes and cheques are so universally described as negotiable instruments that people are apt to lose sight of the fact that there may be a perfectly good bill, note or cheque which is not negotiable, apart altogether from the question of the 'not negotiable' crossing in the case of a cheque; and that the sense in which such a bill, note or cheque is not negotiable includes non-transferability.

Classes of bills

Section 3 of the Bills of Exchange Act (*m*) enumerates three sorts of bills :

1. payable to a specified person ;
2. payable to the order of a specified person ;
3. payable to bearer.

Supervening on this, s. 8 (*n*) draws a sharp distinction between a bill and a negotiable bill. Under sub-s. (1) a bill containing words prohibiting transfer or indicating an intention that it should not be transferable, is good between the parties but not negotiable. It is none the less a bill. Sub-section (2) introduces a different article, the negotiable bill, defining it as one payable to order or bearer. Sub-section (4) defines a bill payable to order as one so expressed, or expressed to be payable to a particular person and which does not contain words prohibiting transfer or indicating an intention that it should not be transferable. Section 36 (1) (*o*), relating to restrictive indorsements, also recognises the distinction between a bill and a negotiable bill. Considerations of these sections will demonstrate the following :

1. that subject, in the case of a cheque, to the 'not negotiable' crossing, any bill, note or cheque on which the word 'bearer' or 'order' appears or is imported by the statute, is and remains a negotiable bill, and that no words prohibiting transfer or indicating an intention

(*m*) 2 Halsbury's Statutes 36.

(*n*) 2 Halsbury's Statutes 39.

(*o*) 2 Halsbury's Statutes 51.

that it should not be transferred have any place thereon or any effect on its negotiability ;

2. that the only 'not negotiable' bill, note or (subject to the 'not negotiable' crossing) cheque is one made payable to a specified person, not containing either 'order' or 'bearer', but containing words prohibiting transfer or indicating an intention that it should not be transferred.

There are hints to the above effect in *National Bank v. Silke* (p) and the conclusion is plain. The first of the above propositions was adopted by LEWIS, J., in *Hibernian Bank, Ltd. v. Gysin and Hanson* (pp). The terms 'transferable' and 'negotiable' are hopelessly mixed up in the Act and in the above-mentioned judgment ; but from the wording of s. 8 (1) it is deducible that the not-negotiable bill, note or cheque (as distinguished from the cheque crossed 'not negotiable') is not only not negotiable but not transferable ; while it is clear that a negotiable bill, note or (subject to the 'not negotiable' crossing) cheque is not only transferable, but, until restrictively indorsed or overdue, absolutely and fully negotiable. *Meyer & Co. v. Decroix, Verley et Cie* (q), is hardly an authority, as the question there was of a qualified acceptance.

Indication of payee

By s. 7, sub-s. 1 (r),

"Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty."

The normal cheque is one in which there is a drawer, a drawee banker and a payee, or no payee but bearer. Some exceptions are introduced by the Act, notably the fictitious payee under s. 7, sub-s. 3 (s). Further latitude has been allowed by decision. In *Chamberlain v. Young* (t) a bill, drawn 'Pay order', was held good as being equivalent to 'Pay to my order' (u). In *Daun and Vallentin v. Sherwood* (w), KENNEDY, J., held that a promissory note in which no payee was named, and which contained neither the word 'order' nor 'bearer', was good, and payable to bearer, but this decision seems very doubtful. In *McDonald (Gerald) & Co. v. Nash & Co.* (y), LORD SUMNER held that a bill 'pay to my order', signed by the drawer but not indorsed by him, was a bill, but not a complete bill, and that s. 8 (5) (z) does not deal with the conditions necessary for a complete bill or

(p) [1891] 1 Q.B. 435 ; 3 Digest 205, 479.

(pp) [1938] 2 K.B. 384, at p. 389 ; [1938] 2 All E.R. 575, at p. 577.

(q) [1891] A.C. 520 ; 6 Digest 64, 522.

(r) 2 Halsbury's Statutes 38.

(s) [1893] 2 Q.B. 206 ; 6 Digest 33, 218.

(s) 2 Halsbury's Statutes 39.

(t) Cf. *North and South Insurance Corporation, Ltd. v. National Provincial Bank, Ltd.*, [1936] 1 K.B. 328 ; Digest Supp., *post*, p. 123.

(w) (1895), 11 T.L.R. 211 ; 6 Digest 28, 175.

(y) [1924] A.C. 625 ; Digest Supp.

(z) 2 Halsbury's Statutes 39.

declare that a bill drawn in that form is complete. On the other hand, LORD HALDANE, L.C., held that such a bill was a complete one, and this appears the correct view.

Drawer is a specified person. LORD SUMNER's contention was in support of a somewhat forced construction of s. 20 (a), and is contrary to the considered judgments of the Court of Appeal in *Decroix, Verley et Cie v. Meyer & Co.* (b) and *National Park Bank of New York v. Berggren & Co.* (c).

A cheque payable to 'A. B. or order' is, of course, payable to A. B. personally, the 'order' being secondary and alternative.

The payee is, as the term imports, the person to whom the drawer primarily intends and directs payment to be made. It rests entirely with the payee whether he will present or negotiate the cheque. If a man presents a cheque payable to 'A. B. or order' undorsed, the legal presumption is that he is A. B. The bank must pay or refuse payment. The right to demand a receipt is very doubtful. It is laid down in Leake on Contracts, 8th (1931) ed., p. 669, that "tender of a sum of money coupled with a demand of a receipt is not a valid tender". In *Jones v. Arthur* (d), a cheque was sent for a certain amount and a receipt requested, the headnote says "required". The cheque was returned as being for an insufficient amount, but no objection was taken to the fact of its being a cheque, or to the request for a receipt. On the question whether this was a valid tender, COLERIDGE, J., said: "He merely requests the plaintiff to send a receipt, which was not a condition", implying that if a receipt had been demanded or insisted on, it would constitute a condition and invalidate the tender. But there is in ordinary cases, where the amount paid is over £2, a means of compelling the giving of a receipt. Under s. 103 (2) of the Stamp Act, 1891 (e), if any person refuses to give a receipt duly stamped, where such receipt would be liable to duty, he is liable to a penalty of £10. The indorsement of an order cheque by payee, though it operates as a receipt, is not liable to duty (f). Therefore if the payee refuses, he is not liable to any penalty under that section. Anyway, the banker is not entitled to demand this particular form of receipt.

Whether protection acquired by obtaining signature of professing payee

The common practice of paying bankers to refuse payment unless the ostensible payee signs on the back of the cheque

(a) 2 Halsbury's Statutes 43.

(b) (1890), 25 Q.B.D. 343.

(c) (1914), 110 L.T. 907; 6 Digest 56, 450.

(d) (1840), 8 Dowl. 442; 12 Digest 328, 2738.

(e) 16 Halsbury's Statutes 649.

(f) See Stamp Act, 1891, Sched. I (Receipts, Exemption 11); 16 Halsbury's Statutes 679.

seems therefore without justification. It is understood that at least one object of demanding such signature is to get the protection of s. 60 (g) should the person presenting the cheque not be the real payee. If so, it would appear that the object is not attained thereby. The reasons for this conclusion are as follows : In *Keene v. Beard* (h) BYLES, J., said :

" One of the best receipts is the placing on the back of the instrument the name of the party who has received payment of it. Such an entry of the name on the instrument is not an indorsement."

In *McDonald (Gerald) & Co. v. Nash & Co.* (j) LORD HALDANE L.C., quotes this, and adds :

" Section 8 (5) is accordingly only declaratory of old law, which has been the law throughout, whatever may have been the cautious practice of bankers and others in asking for what resembles a responsible indorsement for reasons of convenience." (k)

The Bills of Exchange Act, s. 2 (l), defines indorsement thus :

" 'Indorsement' means an indorsement completed by delivery." (m)

To constitute indorsement there must be not only delivery, but the operation must be done *animo indorsandi*, with intention to transfer the instrument by the indorsement (n). There can be no such intention and no real delivery when the cheque has got home and is merely being presented for payment and discharge. The important words in s. 60 (o) are that it is not incumbent on the banker to show that the indorsement was 'made' by or under the authority of the person whose indorsement it purports to be, the word 'made' being more apt to include delivery than 'forged', which occurs later in the section.

It may be objected that where the payee first indorses the cheque and then himself presents it for payment, there is equally no delivery. This objection is met by the consideration that in such case the banker is, under s. 8, sub-s. 3 (p), entitled to treat the cheque as payable to bearer, the only or last ostensible indorsement being one in blank, and that he pays the holder as bearer, not as payee. Section 60 then relieves the banker from the effect of forged or unauthorised indorsement. That section does not contemplate any casual knowledge he may have that the payee is the person actually

(g) 2 Halsbury's Statutes 66.

(h) (1860), 8 C.B.N.S., at p. 382 ; 6 Digest 10, 10.

(j) [1924] A.C., at p. 634 ; Digest Supp.

(k) Cf. Finance Act, 1895, s. 9 (16 Halsbury's Statutes 690), where such signature is treated as a receipt.

(l) 2 Halsbury's Statutes 35.

(m) Cf. *Arnold v. Cheque Bank* (1876), 1 C.P.D., at p. 584 ; 6 Digest 103, 722.

(n) *Lloyd v. Howard* (1850), 15 Q.B. 995, at p. 1000 ; 6 Digest 197, 1217.

(o) 2 Halsbury's Statutes 66.

(p) 2 Halsbury's Statutes 39.

presenting the cheque, and such knowledge could not be imported into the question.

The words of the section which refer to "the indorsement of the payee or any subsequent indorsement" appear to point to the indorsement being for negotiation or at least collection.

So also the form of the protection that it shall "not be incumbent on the banker to show that the indorsement was made by or under the authority of the person whose indorsement it purports to be", seems inconsistent with a case where the signature is affixed by that person in the presence and at the insistence of the banker.

The reference in s. 60 to the banker's being deemed to have paid the bill in due course, notwithstanding the indorsement was forged, points distinctly to the protected payment being one made under the professed sanction of the indorsement, that is, to a holder under it, not to a payee as such.

Section 19 of the Stamp Act, 1853 (*q*), specifically limits the protection to drafts or orders which on presentment for payment purport to be indorsed by the payee, and it might well be argued that the same effect was contemplated in s. 60, which replaces it with regard to cheques.

It would further be open to question, whether a banker paid such cheque "in good faith and in the ordinary course of business" when he exacted the indorsement merely for his own supposed protection.

Ogden v. Benas (*r*) affords no authority, since it was at the instance of the collecting, not the paying, bank that the person claiming to be payee indorsed the cheque.

In *Charles v. Blackwell* (*s*) the cheque was already indorsed when presented; but COCKBURN, C.J., does say:

"By making a cheque payable to order, the drawer obtained the advantage that if the cheque be stolen or lost before it reaches the payee, it cannot be paid without a forged indorsement, the risk of which many persons who would not scruple to present a cheque payable to bearer, in fraud of the true owner, and pocket the proceeds, might yet be unwilling to run."

This might be cited as showing that, even when obtained as suggested, the signature constituted a forged indorsement, but apparently what was in the mind of COCKBURN, C.J., was an indorsement before presentation with the view of making the cheque equivalent to one payable to bearer, especially as the Stamp Act, 1853, s. 19, on which that case was decided, contains the words, "which shall, when presented for payment, purport to be indorsed, etc."

In *National Bank of South Africa v. Paterson* (*t*) a draft of

(*q*) 1 Halsbury's Statutes 543.

(*r*) (1874), L.R. 9 C.P. 513; 3 Digest 242, 692.

(*s*) (1877), 2 C.P.D. 151, at p. 157; 3 Digest 237, 665.

(*t*) Transvaal Law Reports, 1909, Part II. p. 322; *Legal Decisions Affecting Bankers*, vol. ii, p. 214.

£20 was drawn by the Royal Bank of Scotland on the appellant bank in favour of respondent Paterson or his order, and forwarded by letter to a friend of his. The friend, Cook, received the letter, opened it, took out the draft, presented it at the bank, said he was Paterson, forged Paterson's signature on the back of the draft and received the money, which he appropriated to his own use. Neither Cook nor Paterson was a customer of the bank. Paterson sued the bank for the amount. The bank set up a section identical with s. 60. The magistrate found for Paterson. The bank appealed. ROSE INNES, C.J., accepting the line of argument above expressed, dismissed the appeal with costs. To the same effect is the Australian case of *Smith v. Commercial Banking Co. of Sydney* (u). And now the judgment of HALDANE, L.C., in *McDonald (Gerald) & Co. v. Nash & Co.*, cited above (p. 117), seems to settle the question.

Fictitious or non-existing person

One of the chief exceptions to the necessity of an actual payee is introduced by s. 7, sub-s. 3 (w), which enacts that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer".

'Fictitious' or 'non-existing' are terms suitable rather for a philosophic treatise than an Act dealing with mercantile instruments; interpretation is complicated by the antithesis, necessitating differentiation of meaning; and, not unnaturally, judgments dealing with the question exhibit refinements, if not inconsistencies, which render it almost impossible to formulate the general effect of the sub-section.

Decisions on the point

The states of fact which have evoked decisions on this sub-section, and the decisions thereon, are as follows:

A. forges the name of the drawer to a bill ostensibly drawn on B., making it payable to C. or order. He selects the names of drawer and C. to lend colour to the fraud, being the names of persons well known to B. B. is in no wise indebted to the supposed drawer. B. accepts the bill payable at his bankers'. A. forges C.'s indorsement, presents the bill, and obtains the money. The bill is, as against the acceptor, payable to bearer under this sub-section, and the bankers are entitled to debit B. (y).

A fraudulent clerk presents to his employer an order cheque form in which he has inserted the name 'George Brett' as payee. There is no 'George Brett' known to either the clerk or the employer. By falsely stating that

(u) (1910), 11 C.L.R. 667, 673; 3 Digest 238, f.

(w) 2 Halsbury's Statutes 39.

(y) *Bank of England v. Vagliano Brothers* [1891] A.C. 107; 6 Digest 31, 205.

'George Brett' has done work for the employer, the clerk gets the employer to sign the cheque as drawer, forges the indorsement 'George Brett', and negotiates the cheque to an innocent person for value. Held, by the House of Lords, that 'George Brett' was a non-existing person, and the cheque payable to bearer (z).

A fraudulent person, by falsely representing to A. that T. A. Kerr has agreed to sell certain shares, induces A. to draw and give him a crossed cheque payable to T. A. Kerr or order, to pay for the shares. T. A. Kerr is a real person of whose existence A. is cognisant, but he has no such shares, and has never agreed to sell any. The fraudulent person, in pursuance of his original intention, forges T. A. Kerr's indorsement, and pays the cheque into his own bankers, who receive payment thereof in circumstances not affording them protection as collecting bankers. Held, by the House of Lords, that T. A. Kerr was not a "fictitious or non-existing person", and that the bank was liable for the amount (a).

Result of decisions

So far as any general principle can be extracted from these decisions, it would seem to be embodied in the following propositions :

1. that the primary factor is the state of mind and intention of the drawer of the bill or cheque, the original framer of its form ;
2. that if the mind of the drawer is directed to a specific existing individual, whom he intends to receive the money, either by himself or a transferee by his indorsement, such a payee is not a fictitious or non-existing person, although by reason of fraud on the part of a third party in obtaining the instrument, such individual could never have acquired or exercised any rights in relation thereto ;
3. if, by fraud of a third party, a man is induced to draw a bill or cheque in which the name inserted as payee's is that of an imaginary person [though people of that name may and do exist], such payee is "a non-existing person", although the drawer contemplated some one of that name receiving the money by himself or a transferee by indorsement ;
4. where a man accepts a bill payable to an existing person known to him, and whom he intends to receive the money by himself or a transferee by his indorsement, but

(z) *Clutton v. Attenborough & Son*, [1897] A.C. 90 ; 6 Digest 32, 207, as explained in *North and South Wales Bank, Ltd. v. Macbeth*, [1908] A.C. 137 ; 6 Digest 32, 209.

(a) *North and South Wales Bank, Ltd. v. Macbeth*, [1908] A.C. 137 ; 6 Digest 32, 209 ; cf. *Vinden v. Hughes*, [1905] 1 K.B. 795 ; 6 Digest 32, 208 ; *Goldman v. Cox* (1924), 40 T.L.R. 744 ; Digest Supp.

whom the fraudulent person who inserted his name never intended to get hold of the bill or have any rights thereon, the acceptor is liable on the bill as payable to bearer, and it may be treated against him as so payable ;

5. where a bill or cheque falls within the sub-section, it may be treated as payable to bearer, not only by a holder for value, but by anyone else to whose interest it is to treat it ; e.g., a banker who has paid such a bill, domiciled with him, on a forged indorsement.

Fortunately, in the ordinary case of cheques, the banker's protection would not be dependent on the application or interpretation of the sub-section. As paying banker, he would be protected by s. 60 (b), as against forged indorsement ; as collecting banker, he would be protected under s. 82 (c), provided the cheque was crossed. The only instances in which the question would become material to him would be if he took such a cheque as holder for value, or collected it uncrossed for a customer who was in possession under the forged indorsement.

'Wages or order' : 'Petty cash or order'

Cheques made payable to 'Wages or order', 'Petty cash or order', or in analogous forms, with an impersonal payee, were formerly in common use and were treated as payable to bearer. The practice is deprecated by the Council of the Institute of Bankers (d). It is certainly a questionable one. Section 7, sub-s. 3 (e), only authorises such a course where the payee is a fictitious or non-existing 'person'.

Section 2 (f), among other definitions, enacts :

" 'Person' includes a body of persons, whether incorporated or not."

The natural meaning of 'person' excludes inanimate things. The inclusion, by the definition, of entities not usually classed as persons excludes any further extension of the term where used in the Act. The obvious reference of sub-s. 3 is to persons who, but for their being fictitious or non-existing, would be in a position to indorse.

In *Vagliano's Case* (g) LORD SELBORNE said :

"The difficulty, to my mind, arises out of the fact that the legislature has here described 'a person' as fictitious or non-existing, instead of saying 'where the payee is fictitious or non-existing' ;"

clearly recognising the distinction. It should be stated, how-

(b) 2 Halsbury's Statutes 66.

(c) 2 Halsbury's Statutes 76.

(d) See *Questions on Banking Practice*, 8th ed., Questions 725-732.

(e) 2 Halsbury's Statutes 39.

(f) 2 Halsbury's Statutes 35.

(g) [1891] A.C., at p. 129 ; 6 Digest 31, 205.

ever, that LORD HERSCHELL, at p. 153, regarded the distinction as not involving any serious difference; but he seems to be referring rather to the argument (see p. 112) that the payees, being existing persons, could not be 'fictitious or non-existing persons'. For he says, at p. 145:

"Turning now to the words of the sub-section, I confess they appear to me to be free from ambiguity. 'Where the payee is a fictitious or non-existent person' means surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee."

This could hardly apply to an impersonal payee (*h*).

In the old case of *Grant v. Vaughan* (*j*), where a draft on a banker was made payable to 'ship *Fortune* or bearer', LORD MANSFIELD said: "there was no person originally named as the payee; it runs 'Pay to ship *Fortune* or bearer'". WILMOT, J., said: "No person at all is named, it is 'Pay to ship *Fortune* or bearer'".

A banker paying bearer on such a cheque might fairly contend that the customer must have intended him to pay bearer, as the cheque was obviously not capable of indorsement; but there seems no good reason why the banker's position should be complicated or imperilled by the use of documents in this ambiguous and unreasonable form.

In *North and South Insurance Corporation, Ltd. v. National Provincial Bank, Ltd.* (*k*), BRANSON, J., said that *Grant v. Vaughan* supported him in holding that an instrument, in the outward form of a cheque, drawn 'Pay cash or order' was not a cheque. In his view, the printed words 'or order' were to be disregarded, with the result that the instrument was a direction to pay cash—"by necessary implication, to pay it to the bearer of the document". In answer to the contention that the instrument contained no mandate justifying its being acted upon as in fact it was, he decided that the bank had properly interpreted the intention of the drawer, plaintiff, company, and that the latter could not now question the transaction (*l*).

Such cheques do not come within any of the other statutes which afford protection to the paying or collecting banker, and unless falling within s. 7, sub-s. 3, are clearly not negotiable instruments.

A cheque payable to 'Wages or bearer', 'Petty cash or bearer', or in any such form where 'bearer' is used instead of 'order', is, of course, payable to bearer.

(*h*) Cf. *North and South Wales Bank, Ltd. v. Macbeth*, [1908] A.C., at p. 140; 6 Digest 32, 209.

(*j*) (1764), 1 Wm. Bl. 485; 6 Digest 32, 213.

(*k*) [1936] 1 K.B. 328; Digest Supp.

(*l*) *Vide* "Journal of the Institute of Bankers", vol. lvii, pp. 1 and 111, in which it is (in the author's view, rightly) submitted that this decision must not be relied upon as a declaration that in all circumstances a cheque so drawn is to be regarded as a mandate to pay to bearer.

Cheque to specified person

A cheque, 'Pay A. B.', without the addition of the words 'or order' or 'or bearer', is, of course, negotiable by indorsement of A.B. under s. 8, sub-s. 4, of the Bills of Exchange Act (*m*).

Non-transferable cheque

If it is desired to draw a not-transferable cheque payable to a specified person only, the word 'order' or 'bearer' must be erased or struck out and the deletion signed by the drawer (*n*); the cheque should be made payable to 'A. B. only', and the words 'not transferable' prominently written on the face of it horizontally, so as not to suggest a crossing, and initialed by the drawer (*o*). Presumably such a cheque cannot be crossed, as that would involve negotiation or transfer to a banker for collection.

A cheque payable to the order of A. B. is payable to him or his order at his option (*p*).

The common form of cheque, 'Pay self or order', is justified by s. 5, sub-s. 1 (*q*), "a bill may be drawn payable to or to the order of the drawer".

Cheques with no payee

A cheque drawn 'Pay _____ order', indorsed by the drawer, would be a good cheque, the words being interpreted as equivalent to 'Pay to my order' (*r*).

A cheque payable to '_____ or order' is a far more dubious instrument. In *R. v. Randall* (*s*) all the judges, except LAWRENCE, J., sitting as Court for Crown Cases Reserved, held that such a document was not a bill of exchange inasmuch as there was no payee. The question as to the effect of such a document was raised, but not decided, in *Chamberlain v. Young* (*r*).

Even if the decision of KENNEDY, J., in *Dawn and Vallentin v. Sherwood* (*t*) be correct, it does not cover this case, because the use of the words 'or order' negatives the idea of the cheque being payable to bearer.

In a case decided in the Scottish Court of Session, *Henderson, Sons & Co., Ltd. v. Wallace and Pennell* (*u*), a document in the form of a cheque, payable to '_____ or order', was

(*m*) 2 Halsbury's Statutes 39.

(*n*) Cf. *ante*, p. 116.

(*o*) Cf. s. 8, sub-s. 4; *Meyer & Co. v. De Croix, Verley et Cie*, [1891] A.C. 520; 6 Digest 64, 522; *National Bank v. Silke*, [1891] 1 Q.B. 435; 6 Digest 443, 2846.

(*p*) S. 8, sub-sect. 5; 2 Halsbury's Statutes 39.

(*q*) 2 Halsbury's Statutes 38.

(*r*) [1893] 2 Q.B. 206; 6 Digest 33, 218.

(*s*) (1811), Russ. & Ry. 195.

(*t*) (1895), 11 T.L.R. 211; 6 Digest 28, 175 (*ante*, p. 116).

(*u*) (1902), 40 S.L.R. 70; 6 Digest 50, 373 *i*.

given by three signatories to the bank on which it purported to be drawn. None of them had any account at the bank. The bank, by previous arrangement, gave two of them the amount of the cheque, and opened an account in which all three were debited with that sum. The Court held that all three signatories were severally liable to the bank for the amount of the cheque. The LORD JUSTICE-CLERK said that the fact that the cheque was not filled in with the name of the payee made no difference, as the bank paying the money to the two signatories was, as holder of the cheque, entitled to fill in its own name. LORD TRAYNER said that the signatories were rather in the position of makers of a promissory note. Each undertook payment to the payee or his order. The bank which advanced the money was the payee, and to that payee, being also the holder, payment must be made by each and all of the makers of it. This decision is not very clear, but was probably justifiable in the circumstances. Under s. 20 (w) the bank, being in possession of the cheque which was wanting in a material particular, had a *prima facie* authority, which on the facts was a real one, to fill up the omission in any way it thought fit. Under s. 5 (y) a bill may be drawn payable to, or to the order of, the drawee, and the bank might within reasonable time have inserted its own name as payee, when the cheque would have become payable to the bank. It does not appear, however, that it did so.

Anyway, the decision does not cover the case of a banker to whom a document in this form is presented for payment. He would probably act wisely in declining to pay it. He would seemingly not better his position by requesting the holder to fill in his own name as payee. So far as the Bills of Exchange Act goes, the authority to fill up a blank bill, given by s. 20, is only a *prima facie* one; and to make the instrument enforceable against any person who became a party to it prior to its completion, it must be filled up in strict conformity with the authority given.

It is true that the general law of estoppel by delivery of a blank or incomplete negotiable instrument is now recognised as not superseded, but supplemented, by the Bills of Exchange Act (z), and that by the recent judgment of the House of Lords in *London Joint Stock Bank, Ltd. v. Macmillan and Arthur* (a), the operation of that estoppel is not confined to the payee or holder in due course of a cheque, but extends in fitting cases to cover the bank who pays it.

But it is doubtful whether the full force of such estoppel applies to all forms of completion of the instrument, and, now that the banker's right to decline to pay on ambiguous instru-

(w) 2 Halsbury's Statutes 43.

(y) 2 Halsbury's Statutes 38.

(z) *Lloyds Bank, Ltd. v. Cooke*, [1907] 1 K.B. 794; 6 Digest 74, 587; *Smith v. Prosser*, [1907] 2 K.B. 735; 6 Digest 73, 584.

(a) [1918] A.C. 777; 3 Digest 233, 644.

ments is fully established, there seems no reason whatever why it should not be exercised in cases like this.

Notice of dishonour of a cheque

A cheque being a bill, the drawer is entitled to notice of dishonour, and, if this is not given and not excused by circumstances, he is discharged from liability, both on the cheque and on the consideration for which it was given (*b*).

It is anomalous that the drawer of a cheque should be entitled to notice of dishonour, seeing that he is the party primarily liable, and has no remedy over against anyone. In most cases, however, it would be excused. The dishonour of a cheque is generally caused either by there not being sufficient funds to meet it, or by payment having been stopped. In both of these cases s. 50, sub-s. 2 (c) (c), dispenses with notice of dishonour.

As to notice of dishonour by collecting banker see "Collecting Banker", *post*, p. 290.

Stamping unstamped cheques

It is a common fallacy that if a cheque is issued unstamped any holder may affix and cancel an adhesive 2d. stamp. Section 34 of the Stamp Act, 1891 (*d*), provides that the duty may be denoted by an adhesive stamp, which, when the cheque is drawn in the United Kingdom, is to be cancelled by the person by whom the cheque is signed, before he delivers it out of his hands, custody, or power. The proviso to s. 38 (*e*) entitles the banker to whom an unstamped cheque is presented for payment to affix and cancel a 1d., now 2d. (*f*), adhesive stamp, as if he had been the drawer, and either charge the duty against the drawer or deduct it from the sum paid.

There is no power given anywhere to intermediate holders, and the wording of these sections excludes the implication of any such power.

In *Hobbs v. Cathie* (*g*) it was expressly held that a cheque which was issued unstamped, and stamped by an intermediate holder, was improperly stamped, and could not be recovered on, even by an innocent person who subsequently took it for value without notice of the defect. This seems unreasonable and ought to be remedied by legislation. It cannot affect the Revenue whether the stamp is affixed by the drawer, the banker, or anyone not entitled.

(*b*) Bills of Exchange Act, s. 48; 2 Halsbury's Statutes 58; *Peacock v. Pussell* (1863), 14 C.B.N.S. 728; 6 Digest 135, 894; *May v. Chidley*, [1894] 1 Q.B. 451; 6 Digest 473, 3013.

(*c*) 2 Halsbury's Statutes 61.

(*e*) 16 Halsbury's Statutes 629.

(*f*) Finance Act, 1918, s. 36 (2); 16 Halsbury's Statutes 832.

(*g*) (1890), 6 T.L.R. 292; 6 Digest 497, 3148.

(*d*) 16 Halsbury's Statutes 628.

SECTION 3.—DOCUMENTS ANALOGOUS TO
CHEQUES

The documents analogous to cheques, previously referred to, include the following :

A. ORDERS ON BANKERS

Orders for payment are instruments issued by a customer of a bank requiring as a condition of payment the signing by the payee of a particular form of receipt indorsed thereon or annexed thereto. When this is a definite condition of payment, contained in the body of the instrument, addressed to and affecting the banker, such documents are not cheques (*h*).

Such documents are frequently made payable to order or even to bearer, but that would not appear to make them negotiable or even transferable. If they are not expressed to be payable to order or bearer, s. 8, sub-s. (4), of the Bills of Exchange Act (*j*) does not apply,

- (a) because the document is not a bill,
- (b) because s. 8 is not one of the crossed cheques sections, hereafter referred to.

That they are not negotiable even when expressed to be payable to bearer or to order is clear from the judgment of the Court of Appeal in *Gordon v. London City and Midland Bank, Ltd.* (*k*).

Probably not transferable

They would not appear even to be transferable. As the receipt has to be signed by the named payee, if the document were payable to a third party, the incongruous result would accrue that the bank would be paying to B. money which A. had already acknowledged to have been paid to him in accordance with the order. This point appears never to have been raised, either by counsel or the Court in cases where it might have been, e.g., *Bavins, Junr. and Sims v. London and South Western Bank*, or the *Gordon Case* (*l*).

May be crossed

Section 17 of the Revenue Act, 1883 (*m*), extends the provisions of the crossed cheques sections, 76–82 inclusive (*n*), to

“ . . . any document issued by a customer of any banker and intended

(*h*) Cf. *ante*, p. 105, Section 2.—Requisites in Form. *Bavins, Junr. and Sims v. London and South Western Bank*, [1900] 1 Q.B. 270 ; 6 Digest 18, 81 ; *London City and Midland Bank, Ltd. v. Gordon*, [1903] A.C. 240 ; 6 Digest 18, 82.

(*j*) 2 Halsbury's Statutes 39.

(*k*) [1902] 1 K.B., at p. 275.

(*m*) 16 Halsbury's Statutes 547.

(*l*) Cf. *ante*, p. 105.

(*n*) 2 Halsbury's Statutes 74–76.

to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque. Provided that nothing in this Act contained shall be deemed to render any such document a negotiable instrument."

This seems to contemplate a duty on the part of a banker to pay or collect such documents as ground for protection.

In *Bavins and Sims' Case* and in the *Gordon Case* in the Court of Appeal, *ubi supra*, documents of this class were distinctly recognised as being brought within the crossed cheques sections by this enactment, though in each case circumstances deprived the bank of the protection of s. 82, in the later case crediting as cash being apparently the cause.

In *Gordon's Case* in the House of Lords, LORD LINDLEY (o) is reported as saying :

"There remains only class 8, *i.e.*, instruments drawn in favour of Gordon and Munro and crossed, payable only upon signature by the payees of a form of receipt at the foot of the instrument, and not drawn upon the appellants. These documents are clearly not bills of exchange within the meaning of the Bills of Exchange Act. Nor, for reasons already given, are they brought within it by s. 17 of the Revenue Act, 1883."

And the other Law Lords assented to LORD LINDLEY's judgment, specially with regard to the various classes of documents involved, with which he alone dealt in detail. The only previous mention of the Revenue Act, 1883, in the judgment is at p. 250, where LORD LINDLEY had pointed out that it could not apply to bankers' drafts drawn by branch on head office, inasmuch as they were not issued by a customer of the bank but by the bank itself. That is, of course, not the case with orders to pay, which are issued by a customer, and has no application to the position of a collecting bank, as in the *Gordon Case*, setting up the protection of s. 82 by virtue of s. 17 of the Revenue Act, 1883. The documents in question are clearly within the terms of that Act; and as various reports reproduce LORD LINDLEY's words in the same form, it can only be supposed that what he meant to say was to the same effect as the judgment of the Court of Appeal on the same point, namely, that though these documents were within the crossed cheques sections under s. 17 of the Revenue Act, 1883, the bank had lost the protection of s. 82 by reason of having credited them as cash.

In *Underwood (A. L.), Ltd. v. Bank of Liverpool (p)*, at p. 792, SCRUTTON, L.J., says :

"This defence (s. 82) does not avail the bank for those . . . documents which, though in form cheques, are not unconditional promises to pay, because the order to pay is conditional on a receipt on the cheque being signed by the payee."

This was discussed in *London and Montrose Shipbuilding and*

(o) [1903] A.C., at p. 252.

(p) [1924] 1 K.B. 775 ; Digest Supp.

Repairing Co., Ltd. v. Barclays Bank, Ltd. (q), by MACKINNON, J., who came to the conclusion that these words must have got in *per incuriam*. Such would seem to be the case. There is nothing whatever about 'unconditional' in s. 17 of the Revenue Act, 1883, and the documents it deals with are not promises to pay, conditional or otherwise, any more than are cheques.

Question as to negotiability

This application of the crossed cheques sections by the Revenue Act, 1883, produces a curious contradiction. The Revenue Act distinctly treats these documents as being and, when crossed, remaining not-negotiable instruments. If 'not negotiable' is to be taken in the sense in which it is used in the Bills of Exchange Act, it means 'not transferable'. Section 8 (1) (r) says :

"When a bill contains words prohibiting *transfer* or indicating an intention that it should not be *transferable*, it is valid as between the parties thereto, but is not negotiable."

The italics are the Author's.

But since ss. 76, 77 and 81 (s) are among the crossed cheques sections, it might be argued that under them the document is negotiable until crossed 'not negotiable', and when so crossed remains transferable "in like manner as if it were a cheque". It is submitted it is not so. The enacting section of the Revenue Act must override what it merely incorporates or applies, and the negative provisions of s. 81 are not sufficient to establish negotiability in a case not really covered. At any rate, when the incorporating section is invoked by the banker, he must take it as a whole ; and the words "intended to enable any person or body corporate to obtain payment" are utterly inconsistent with the idea of the document's going beyond the person or body corporate who or which is obviously the specified payee. It is, however, to be noticed that both in *Bavins, Junr. and Sims v. London and South Western Bank* and the *Gordon Case* the crossed documents were taken by the collecting bank from a person other than the payee, by whom they purported to be indorsed or signed, and in neither case was any objection raised or point made in the judgments on this ground.

The real difficulty arises with regard to collection of these documents, and payment of them to the collecting banker. The importation of the crossed cheques sections authorises and, where made use of, necessitates the intervention of a banker. If the document is to order, there must be indorsement and delivery to that banker ; if to bearer, negotiation to that banker, for a collecting banker is of necessity a holder.

The position is quite illogical, and must apparently be

(q) (1926), 31 Com. Cas. 182 ; Digest Supp.
(r) 2 Halsbury's Statutes 39.

(s) 2 Halsbury's Statutes 74, 76.

accepted and treated as such. The reasonable outcome seems to be that in the absence of any evidence or indication of negotiation to third parties by the payee, the collecting banker can collect, and the paying banker pay, these documents when crossed, as if they were really crossed cheques, and would each be entitled to the relative protection under the crossed cheques sections. A plausible, though doubtful, argument might be that the banker, in collecting, was acting purely as agent for the payee, and not as indorsee, and that the paying banker was justified in paying him in that capacity. Or it might be contended that such documents were treated as negotiable in *Bayns, Junr. and Sims v. London and South Western Bank* and the *Gordon Case*, and therefore those cases are authority for that negotiability, which no doubt to a certain extent they are.

As to protection of banker paying

Subject to the foregoing remarks, the bank paying such documents does not appear to be protected under s. 19 of the Stamp Act, 1853 (i).

With regard to this, all that LORD LINDLEY says in the *Gordon Case* (u) is :

"Nor do they come within s. 19 of the Stamp Act, 1853, which, as I have already observed, applies only to banks which are drawees."

The documents in that case were not drawn on the defendant bank, and it would be too much to deduce from the above words that the section necessarily protects the bank on which such documents are drawn. The opposite appears to be the case. The section only applies to "drafts or orders payable to order on demand". If the documents are not negotiable they are not payable to order, and moreover are not capable of indorsement, against forgery of which the section alone affords protection. Moreover, where the signature of the receipt is made a condition of payment, that means an authentic signature, and the banker can only debit the customer where the receipt has been signed by the right person.

Another troublesome form of these documents is one in which the signature of the receipt is not made a condition of payment, so that the instrument remains a cheque. It is made payable to order; then there is a note, "The annexed receipt [or the receipt at back] must be stamped and signed before presentation for payment", and a further note, "This signature is intended for indorsement of the cheque as well as signature of the receipt", or "No further indorsement of this cheque is necessary". Such would seem to have been the form in *London and Montrose Shipbuilding and Repairing Co., Ltd. v. Barclays Bank, Ltd.* (v). That decision was reversed on appeal, but the appeal is not reported and is understood to have

(i) 1 Halsbury's Statutes 543.

(u) [1903] A.C., at p. 252.

(v) (1926), 31 Com. Cas. 182, C.A.; Digest Supp.

been on independent grounds. And in that case there was indorsement as well as receipt.

It is submitted that signature of the receipt is not an effective indorsement. There is no legal authority that indorsement can be effected by a signature which concurrently fulfils another purpose. The *animus indorsandi* can hardly be predicated in such case. The idea seems opposed to s. 32 (w). No doubt the payee's indorsement of an order cheque may be utilised as a receipt, but that is an incidental matter; the debt has to be identified with the cheque and the payee's indorsement to give the latter this effect. It would seem, therefore, that such signature would not give the banker protection under s. 60 (x) if it proved to be a forgery. It would be far better if the note ran, "This cheque requires formal indorsement as well as signature of the receipt". Bankers usually decline to pay instruments of this class except under indemnity from their customers, but, as pointed out by the Institute of Bankers in a valuable article on the whole subject from the banker's point of view (y), it might very possibly turn out, when it was sought to enforce such indemnity, that it was *ultra vires* the corporation or undertaking who gave it, and it is from such bodies that these documents most commonly emanate.

The receipt for such documents if for over £2, when executed, should bear an independent receipt stamp, not being within the exemption of s. 9 of the Finance Act, 1895 (z), of the name of the payee written upon a draft or order payable to order. The proviso to that section states that "neither the name of a banker (whether accompanied by words of receipt or not) written in the ordinary course of his business of a banker upon a bill of exchange or promissory note duly stamped, nor the name of the payee written upon a draft or order, if payable to order, shall constitute a receipt chargeable with stamp duty". It would seem to be the view of the Inland Revenue that a receipt completed by a banker upon a cheque payable to him attracts receipt duty, as it is not given "in the ordinary course of his business as a banker" . . . but in the capacity of payee or agent of the payee" (a). A paying banker cannot, however, know for whose account the cheque is intended unless there is some indication on the face of it, and, anyhow, he is concerned only with his customer's mandate, which would usually authorise him to pay only if the receipt were completed by signature and stamp.

B. BANKERS' DRAFTS

Drafts drawn by a branch on another branch or on the

(w) 2 Halsbury's Statutes 49.

(x) 2 Halsbury's Statutes 66.

(y) "Journal of Institute of Bankers", vol. xl, p. 310.

(z) 16 Halsbury's Statutes 690.

(a) Letter dated 24.3.1937 from Inland Revenue to the Institute of Bankers.

head office of the same bank or *vice versa* are not cheques or bills, there being no distinct drawer and drawee (*b*). The decision of BAILHACHE, J., in *Ross v. London County, Westminster, and Parr's Bank, Ltd.* (*c*), to the contrary effect, is wrong.

A banker's draft payable to bearer on demand would probably be an infringement of the provisions of the Bank Charter Act, 1844, ss. 10 and 11 (*d*), as explained by the Stamp Act, 1854, s. 11 (*e*). The word 'holder' in the latter section, which would primarily include the payee, must be read as synonymous with 'bearer', and not as casting any doubt on the legitimate character of bankers' drafts payable to order on demand.

Bankers' drafts payable to order on demand were always within the protection of s. 19 of the Stamp Act, 1853 (*f*), though for reasons previously stated (*g*) this decision seems open to criticism. Under the successive Drafts on Bankers Acts, 1856 and 1858, and the Crossed Cheques Act, 1876, and until the passing of the Bills of Exchange Act, 1882, the document susceptible of crossing was "a draft or order on a banker payable on demand", the term being specially used in the first two Acts, and as the interpretation of 'cheque' in the 1876 Act. On the construction put on the same words, when occurring in the Stamp Act, 1853, s. 19, by the House of Lords in the *Gordon Case*, they would include a banker's draft payable on demand. But the Bills of Exchange Act (*h*) repealed the Crossed Cheques Act, 1876, which had itself repealed the previous ones; and in re-enacting the crossed cheques sections uses throughout the word 'cheque', which it defines (*j*) as "a bill of exchange drawn on a banker payable on demand". Since the passing of the Bills of Exchange Act (1882) Amendment Act, 1932, however, the crossed cheques sections of the parent statute apply to bankers' drafts as if they were cheques. Before that statute any crossing was a nullity and refusal to pay over the counter, if solely on account of the crossing, was unwarranted dishonour.

Foreign and inland

In the *Gordon Case* (*k*) LORD LINDLEY referred to the doubt expressed in several of the text-books whether s. 19 of the Stamp Act, 1853, applied to any except inland drafts or orders.

(*b*) *London City and Midland Bank, Ltd. v. Gordon*, [1903] A.C. 240; 3 Digest 200, 454.

(*c*) [1919] 1 K.B. 678; 6 Digest 35, 242.

(*d*) 1 Halsbury's Statutes 536.

(*e*) 1 Halsbury's Statutes 544.

(*f*) 1 Halsbury's Statutes 543. See *London City and Midland Bank, Ltd. v. Gordon*, [1903] A.C. 240; 6 Digest 35, 241.

(*g*) *Ante*, p. 101.

(*h*) S. 96; repealed by Statute Law Revision Act, 1898; 18 Halsbury's Statutes 1173.

(*j*) S. 73; 2 Halsbury's Statutes 73.

(*k*) [1903] A.C., at p. 251.

Foreign bills, it is said, were not subjected to any stamp duty until the following year, 1854, and the section, occurring as a proviso in a Stamp Act, can only be treated as applicable to documents chargeable with stamps under the Act containing it. It is conceived that this is not so, and that the protection extends to all documents falling within its terms at the present day. The point is somewhat important; *Gordon's Case* having established that inland drafts issued by one branch of a bank on another, or the head office, fall within those terms, it is desirable that the protection should extend to the commoner case of such drafts drawn abroad on the head office in England.

The reasons for holding that it does so extend are as follows:

- (a) the fact that the section occurs in a Stamp Act is immaterial, it being perfectly general and self-contained in its terms;
- (b) the fact that it is couched in the form of a proviso is not incompatible with its being a substantive enactment (l); see, however, *R. v. Dibdin* (m);
- (c) the fact that on the passing of the Bills of Exchange Act it was intentionally left unrepealed, of which judicial notice was taken in the *Gordon Case*, implies that it is applicable to drafts and orders in use at the present time, whether originally subject to stamp duty or not;
- (d) if, as stated by LORD LINDLEY in *Gordon's Case*, the object of the enactment was to protect bankers against the increased use of order drafts on them, occasioned by the reduction of the stamp duty, and these documents fall within the definition, the protection would appear all the more necessary in the case of foreign drafts, which required, at the time, no stamp at all;
- (e) statutes are not to be confined to conditions existing at the date of their passing, if the wording is wide enough to include subsequent developments (n);
- (f) in *Brown, Brough & Co. v. National Bank of India, Ltd.* (o), BIGHAM, J., in a case of a draft of this sort drawn in Madras on London, expressly stated that, but for the then existing ruling of the Court of Appeal in *Gordon's Case*, subsequently reversed, he would have held the document to be within this s. 19 of the Stamp Act, 1853. The House of Lords, in *Gordon's Case*, referring

(l) See *Matthiessen v. London and County Bank* (1879), 5 C.P.D. 7; 6 Digest 442, 2841.

(m) [1910] P. 57, per FLETCHER MOULTON, L.J., at p. 125; 42 Digest 660, 689.

(n) *A.-G. v. Edson Telephone Co. of London* (1880), 6 Q.B.D. 244; 42 Digest 885, 1.

(o) (1902), 18 T.L.R. 669; 3 Digest 239, 669.

to this decision, did not express dissent on the ground of the draft being foreign ; but the question was not relevant to the drafts before them, which were inland ;

- (g) Stat. 35 & 36 Vict. c. 44, s. 11 (p), refers to this section, and states that it " relates to the indorsement of drafts or orders drawn upon bankers for the payment of money " without any limitation as to their being inland drafts only.

Of course, a draft drawn by one bank on another, so long as it is in cheque form, is an ordinary cheque and treated as such in all respects.

C. ' CHEQUELETS '

The raising of the stamp duty on cheques to twopence in 1918 caused general dissatisfaction, and in 1927 the Midland Bank organised a scheme by which customers could obtain free of charge from any branch a ' book of receipts ' containing a number of forms which, being available only for the payment of sums under £2, would, according to the view taken by the bank, not require to be stamped either as cheques or receipts. Considerable interest was aroused and the tentative instruments became known as ' chequelets '.

Two forms are set out in the report of the subsequent legal proceedings, *Midland Bank, Ltd. v. Inland Revenue Commissioners* (q), the only apparent difference being that No. 1 is uncrossed while No. 2 purports to be crossed ' Coutts & Co., Strand 11 '. Both were unstamped, and had apparently been paid. The material words are, of course :

" Received of the Midland Bank, Ltd., the sum of _____,
at the debit of my/our account."

The document was to be signed by the customer, and could then be presented for payment in cash at the branch on which it was drawn, or handed to a tradesman or other creditor in settlement of a debt, to whom it would in like manner be paid on presentation. Or it could be presented through a bank. These documents do not seem to have been issued with any crossing ; the crossing on No. 2 is a special one, consisting only of a banker's name, and was presumably put on by the customer or his transferee.

Previous to the issue of any book of receipts the customer had to sign a form of request in the following terms :

Midland Bank,
Branch.

I/we request you to allow me/us to withdraw from time

(p) This statute was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 139 (4 Halsbury's Statutes 185), which uses the same wording.

(q) [1927] 2 K.B. 465 ; " Journal of Institute of Bankers ", vol. xlviii, p. 436 ; Digest Supp.

to time from my/our account with you sums under £2 each against delivery to you of receipts addressed to you and duly signed by me/us, and I/we authorise you to pay the amount of such receipts to the bearer thereof and to debit the same to my/our account.

[Signature of customer.]

Dated this day of

19 .

Address of customer.

These instruments the bank submitted to the Commissioners of Inland Revenue under s. 12 of the Stamp Act, 1891 (*r*), for their opinion as to the stamp duty, if any, with which they were respectively chargeable. The Commissioners gave it as their opinion that each of the instruments was a bill of exchange within the true intent and meaning of the Stamp Act, 1891, and being payable on demand, sight, or presentation, was chargeable with the duty of 2d. under that Act and s. 36 of the Finance Act, 1918 (*s*). The bank declared themselves dissatisfied with this determination, and required the Commissioners to state a case, which was accordingly done.

Mr. Justice ROWLATT upheld the decision of the Commissioners. He held that it was not the mere wording of the document in the abstract which must be looked at, but the function of the document as intended and understood by the parties who employ it, supporting this view by the judgment in *Rothschild & Sons v. Inland Revenue Commissioners* (*t*). He pointed out that, though referred to as a receipt, this document was not a receipt unless and until it was used as such by being given as an acknowledgment of payment. When the person signing it gave it to his creditor, he was not giving a receipt, and if it were for an amount of £2 or upwards he would not incur a penalty for giving an unstamped receipt.

Unless inquiry into the meaning of its existence in the hands of the bearer is to be admitted, the document at that stage has effected nothing at all, it has not indeed come into existence. Holding, as he does, that such inquiry is permissible, he finds the document has effected something, it has come into existence as a delivered document and its function has been to entitle the recipient to payment of it. It had been argued that the document did not entitle the holder to sue the bank, nor, upon the document itself, the signatory. ROWLATT, J., however, decided, on the authority of *The Committee of London Clearing Bankers v. The Commissioners of Inland Revenue* (*u*), that no such right of action is necessary to bring a document within the terms of the section of the Stamp Act, which enacts that for the purposes of this Act the expression

(*r*) 16 Halsbury's Statutes 621.

(*s*) 16 Halsbury's Statutes 831.

(*t*) [1894] 2 Q.B. 142, per MATHEW, J., at pp. 146, 147; 6 Digest 493, 3125.

(*u*) [1896] 1 Q.B. 542; 6 Digest 493, 3126.

'bill of exchange' includes draft, order, cheque and letter of credit and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of any sum of money. He gave judgment for the Commissioners with costs.

The judge made no distinction between the two specimens submitted and did not refer to the ostensible crossing on No. 2.

As he decided the case on the document entitling to payment part of the section, the ostensible crossing was probably immaterial. The various descriptions in the section are independent; it does not say "any *other* document", so that the document is not necessarily *ejusdem generis* with draft, order or cheque. No doubt the judge decided the case on the more obvious lines, but in view of the form filled up by the customer at the request of the bank, the words, "at the debit of my account", and the assumption that the document could be crossed, it would seem that it was equally liable to stamp duty as an 'order'. The bank recognised the authority of the customer to draw these documents, it had accepted the position of mandatory to him with regard to them as if they had been cheques; the bank had undertaken to pay them out of current account and would have been liable in damages if they had dishonoured one without sufficient cause and actual injury had accrued.

In *Buck v. Robson* (w) the Court, discriminating between a mere assignment of a debt and an order requiring a stamp under the section of the Stamp Act, 1870, which was in the same terms as s. 32 of the 1891 Act (y), say as follows: "In our acceptance of the term, an order for payment presupposes moneys of the drawer in the hands of the party to whom the notice is addressed, held on the terms of applying such moneys as directed by the order of the party entitled to them". Allowing for the latitude of language which describes current account as money in the banker's hands, this would seem to bring these documents within the category of 'orders'.

No question appears to have arisen with regard to the issue by bankers of 'chits' for racing purposes.

D. DIVIDEND WARRANTS

Dividend warrants are frequently nothing more nor less than cheques in a somewhat unusual form, though it is by no means necessary, as was unsuccessfully contended in *Thairlwall v. Great Northern Railway Co.* (z), that a dividend warrant should be a cheque. If a dividend warrant contains any condition or feature excluding it from the character of a

(w) (1878), 3 Q.B.D. 686; 6 Digest 35, 238.

(y) 16 Halsbury's Statutes 627.

(z) [1910] 2 K.B. 509; 6 Digest 15, 54.

cheque, it must stand on its own footing. A dividend warrant, for instance, drawn payable to payee or bearer, but requiring to be countersigned by the payee, is not a cheque.

Question of negotiability

The negotiability of dividend warrants, as such, does not appear ever to have been judicially recognised (*a*). Sir Mackenzie Chalmers seems to suggest that dividend warrants fall within the general provisions of the Bills of Exchange Act unless excluded by special features (*aa*). They could not do that unless they were bills or notes; s. 8 (*b*), for instance, to which Sir Mackenzie Chalmers specially refers, is in terms confined to bills. The extension to dividend warrants of the crossed cheques sections by s. 95 (*c*) is more consistent with their being altogether outside the Act for other purposes than with their classification as cheques. Dividend warrants being thus entitled to the benefits of the crossed cheques sections, the argument (*d*) with reference to orders for payment with receipt attached, as to the implication of negotiability from the application of the 'not negotiable' crossing, applies perhaps more forcibly in this case, where the sections referring to that crossing are applied by the Act itself. But it is submitted that negotiability has never been conferred by statute in such indirect and negative fashion. Section 97 (3) (*d*) (*e*) preserves "the validity of any usage relating to dividend warrants or the indorsement thereof". This clearly leaves the question of negotiability at large, and the section is probably only directed to the custom of bankers to pay dividend warrants which are payable to several payees on the indorsement of one. It seems, however, very probable that dividend warrants have now acquired negotiability by custom of merchants, and that on evidence of such custom the Courts would recognise the fact.

E. INTEREST WARRANTS

The question has frequently been raised and vehemently debated whether the provisions of ss. 95 and 97 (3) (*d*) (*f*) extend to warrants for the payment of fixed interest, or are confined to dividend warrants strictly so termed; particularly whether a banker is justified in paying an interest warrant, payable to two payees or order on the indorsement of one of them, as he is in the case of a dividend warrant, by the usage preserved by s. 97 (*d*). Up to the time of the decision in *Slingsby v. Westminster Bank, Ltd.* (*ff*), the controversy appeared to have

(*a*) Cf. *Partidge v. Bank of England* (1846), 9 Q.B. 396; 3 Digest 129, 49; *Goodwin v. Roberts* (1875), L.R. 10 Exch., at p. 354.

(*aa*) Chalmers' *Bills of Exchange*, 10th ed., p. 385.

(*b*) 2 Halsbury's Statutes 39.

(*c*) 2 Halsbury's Statutes 80.

(*e*) 2 Halsbury's Statutes 80.

(*ff*) [1931] 1 K.B. 173; Digest Supp.

(*d*) *Ante*, p. 129.

(*f*) 2 Halsbury's Statutes 80.

terminated in favour of the negative view. And, in spite of that decision, this is surely right.

There has been and is a widespread misapprehension or misuse of the term 'Dividend warrant'. Take for instance $3\frac{1}{2}$ per cent. War Loan 1929-1947, officially designated as such. The holder receives from the Bank of England a document headed "Dividend warrant, $3\frac{1}{2}$ per cent. War Stock 1929-1947". Then follows the definition of the payment, "Half-year's *interest* at $3\frac{1}{2}$ per cent". It is drawn by the "Chief Accountant" of the Bank of England, addressed "to the Cashiers of the Bank of England", crossed generally, and marked "not negotiable". There is a note: "Warrants outstanding more than six months after date must be sent to the Bank of England for verification". And the same or an analogous form is employed by any number of governments, corporations and companies for payment of fixed interest on loans, bonds, mortgage debenture stock and the like. Presumably these are all treated as pure dividend warrants; and if custom could abrogate the plain wording of a statute, a custom to so treat them could doubtless be proved, possibly at the time of the passing of the Bills of Exchange Act, more probably after. No doubt, where words are open to two constructions, such considerations may be accorded weight, but such is not the case here. The words used in s. 97 are "dividend warrants and the indorsement thereof"; in s. 95 "a warrant for the payment of dividend". It cannot be suggested that they apply to any but one class of document, whatever it may be, and the wording of s. 95 is perhaps more forcible than that of s. 97.

Again, it is said that, in 1882, the term dividend warrant was generally interpreted as including interest warrants. It is, no doubt, a rule of construction that words in an Act of Parliament are to be understood in the sense in which they were used at the time of its passing; but this cannot extend to impose upon a word a meaning essentially foreign to its plain grammatical and ordinary purport. If people in 1882 called an interest warrant a dividend warrant they can hardly have called it "a warrant *for the payment of dividend*". Dividend is and means a share of the fluctuating net profits of an undertaking, which, in the discretion of the directors, are divided among the shareholders, otherwise the proprietors of that undertaking, in proportion to their holdings. It is variable in amount, and the shareholder has no remedy if less is paid than he expects, or even nothing at all. The principal of each holder is merged in the capital of the concern, is represented by so many shares or so much stock, and there is no debt due to him from the undertaking on which interest could accrue. Interest is a periodical payment of money at a fixed rate in consideration of a loan or forbearance to enforce payment of a debt.

The person who subscribes to a War Loan or any other government or corporation loan, or who takes or buys government or corporation bonds or debenture stock in a company, is in exactly the same position as any other creditor, or as a man who opens a deposit account with his banker. He simply lends his money at an agreed rate of interest. 'Loan' is money lent; 'bond' an obligation to pay; 'debenture' a security for money owed. The person so lending his money acquires no property or share in the concern, no right to share in the profits. If it be a company, and shareholders get a dividend of 50 per cent., he would not be entitled to a penny more than his stipulated interest of, say, 5 per cent. If the shareholders got nothing he would still have an enforceable claim for his 5 per cent. There is no question of anything being *divided* so far as he is concerned. If he buys his bonds, War Loan, or whatever it is from another person, instead of taking it up direct from the issuer, he simply takes an assignment of the debt and stands in the shoes of his transferor, or the original creditor. In the face of these facts, can it be maintained that a warrant for payment of interest is identical with or fairly described as a dividend warrant or a warrant for payment of dividend? FINLAY, J., in *Slingsby v. Westminster Bank, Ltd.* (g), held both (a) that a 5 per cent. War Loan warrant was a cheque, as the Chief Accountant of the Bank of England, who signed the warrant, was acting as the agent of the government; and (b) that s. 95 applied, the statutory meaning of 'dividends' being that part of the profits of a company *divisible* among its shareholders. It is not clear from the judgment whether the learned Judge intended this latter part of his decision to cover warrants issued in pursuance of the statutes applicable to government loans only, or to all warrants for the payment of interest. It looks rather as if he did, but as his view on this point was not necessary to the decision, it must be regarded as an *obiter dictum*.

In some cases, the method is adopted of making the interest warrant payable to one of the payees, identifying the account by stating on the face of it, 'Account A. B., C. D., and E. F.', or as may be, A. B. being the specified payee. There the indorsement of A. B. is, of course, sufficient for the banker, though the amount should not be credited to the private account of the specified payee. Another form is 'Pay A. B. and another', on which the indorsement usually required is 'For self and another, A. B.'

The effect of this depends a good deal on whether the interest warrant is in other respects a cheque or not; whether it possesses all the features requisite in a cheque, or any which disentitles it to that character.

If a cheque, s. 7 (2) (h) permits its being "made payable

(g) [1931] 1 K.B. 173; Digest Supp.

(h) 2 Halsbury's Statutes 39.

to two or more payees jointly", or it may be made payable in the alternative to one of two or one or more of several payees. Section 7 (1) provides that "where a bill is not payable to bearer the payee must be named or otherwise indicated therein with reasonable certainty". Singular includes plural, therefore where there are two payees, both must be named or indicated with reasonable certainty. Is 'another' an indication of a payee with reasonable certainty?

Presumably the drawer knows who it is, because the name is on the books; the named payee knows who it is, because he is jointly interested in the payment. It seems, however, rather stretching the meaning of "indicated with reasonable certainty" to import the private knowledge of these two parties. The banker who has to pay the cheque would know nothing of the 'another's' identity. If, however, the identification is held sufficient, the form of indorsement 'for self and another' might hold good, though here again it is not a usual one.

If these cheques were drawn payable in the alternative to one of two or more named payees, this would be clearly within s. 7, and this does not seem more open to abuse than the course above described.

In many cases of dividend and interest warrants, s. 17 of the Revenue Act, 1883 (*j*), will be found to cover the situation. If, for instance, in the example above cited, it were held that it was not a cheque because one of the payees was not indicated with reasonable certainty or the indorsement was not a proper one, still, if the instrument was crossed, as they usually are, and was issued by a customer of the banker, as the majority are, there seems no substantial reason why it should not carry the protection of the crossed cheques sections given by s. 17 of the Revenue Act, 1883. The instrument is a document issued by a customer of the banker and is clearly intended to enable a person, namely, the named payee, to obtain payment from that banker of the sum named. The paying banker cannot be charged with negligence in paying it on such an indorsement as that cited above; if a second name were added, he would be in the dark as to whether it was that of 'another' or not, and the indorsement of the named payee 'for self and another' seems the most reasonable form to accept in the circumstances.

Were it not for the decision in *Slingsby v. Westminster Bank, Ltd.*, concerning the 5 per cent. War Loan warrant previously referred to, it should be noted that if it, or a similar form, had to be judged by the ordinary law of bills and cheques, it would not be entitled to the status of a cheque, a dividend warrant, or a document capable of being crossed under s. 17 of the Revenue Act, 1883. It

would not be a cheque, because it is drawn by a representative of the bank on other officials of the same bank (*k*) ; it is not a dividend warrant, because it is for interest, not dividend ; it is not within s. 17 of the Revenue Act, 1883, because it is not drawn by a customer of the bank. The only protection would be against forged indorsement as a draft or order drawn upon a banker under the interpretation of s. 19 of the Stamp Act, 1853 (*l*), by the House of Lords in the *Gordon Case*. It is therefore not susceptible of crossing, or of being marked 'not negotiable'. Nor would a collecting banker get any protection from an ostensible crossing.

F. ORDERS BY LOCAL AUTHORITIES

The methods by which local authorities are constrained to receive and make payments under the control of the Ministry of Health, as successors to the old Local Government Board, have introduced an anomalous and somewhat hazardous type of instrument.

There may be minor differences in the procedure of the numerous and various bodies which come within the scheme of local government, and it is only possible to deal with the more prominent and usual examples. It may be taken as common to all these bodies that they have to appoint a treasurer, who is to receive moneys coming in, and by or through whom all payments are to be made (*m*). Such treasurer should be an individual, not a firm or a corporation. Throughout the Acts regulating the qualifications and liabilities of the treasurer, there are provisions and expressions only consistent with this. He is not to be a member of the council, he is to give security ; if he does not render proper accounts he may be liable to imprisonment, and so forth.

Glen's Public Health Act, 14th (1925) ed., vol. i, p. 529, says :

"It is necessary that some responsible individual should be appointed Treasurer : the Act is not satisfied by the appointment of a banking company as Treasurer."

In *Re West of England and South Wales District Bank, Ex parte Swansea Friendly Society* (*n*), FRY, J., basing his judgment on statutory directions, such as those above referred to, held that the bank, though it might become the banker of the society, could not be its treasurer because the rules showed that the treasurer had to perform certain personal duties. There have been intimations from government departments that

(*k*) Cf. *Allen v. Sea, Fire, and Life Assurance Co.* (1850), 9 C.B. 574 ; 6 Digest 24, 139.

(*l*) 1 Halsbury's Statutes 543.

(*m*) *Vide* Local Government Act, 1933, ss. 184 and 187 ; 26 Halsbury's Statutes 406, 408 ; London Government Act, 1939, s. 122 ; 32 Halsbury's Statutes 316.

(*n*) (1879), 11 Ch. D. 768 ; 10 Digest 1064, 7456.

corporations must not be treasurers, and that they will not sanction any such appointment.

The Local Government Act, 1933, requires in ss. 102 and 107 that the treasurer shall be a fit person, which term includes any body of persons, corporate or unincorporate, unless the contrary appears (*o*). Moreover, the 1933 Act contemplates the imposition on the treasurer of duties and liabilities which can only be performed and suffered by a person as opposed to a corporation (see also *Lumley's Public Health*, 11th (1937) ed., p. 870).

Payments to and out of a county fund must be made in accordance with s. 184 of the Local Government Act, 1933. They must be made to and by the treasurer, who, in paying, will act pursuant to an order of the county council signed by three members of the finance committee thereof present at the meeting at which the order is made, and countersigned by the clerk of the council. The order is to be made in pursuance of a resolution of the council passed on the recommendation of the finance committee. With regard to urban and rural district councils, orders for payment on the treasurer are governed by standing orders made under Article 4 of Part V of the Third Schedule to the statute (*p*). In this connection, the Minister of Health has issued model standing orders (under cover of Circular 1444 of 31/12/1934) suggesting that orders for payment be signed by three members of the council present at the meeting, of whom one should be the chairman, and should be countersigned by the clerk. By s. 193 (8) of the statute (*q*) "Every cheque or other order for the payment of money by a parish council shall be signed by two members of the council".

The original idea probably was that the treasurer should keep an account at a bank, that orders should be drawn upon him, and that he should pay the amounts by cheque drawn on his own account. That method does not appear to have been adhered to. The usual method adopted seems to be that a bank manager or other bank official is appointed treasurer and an account kept at his bank in his name. Rate collectors and other officials pay in money received by them to this account. The orders for payment are drawn by the council of the local authority direct on the treasurer, on the form prescribed or approved by the government, and are handed or sent to the creditors. The creditors present them direct to the bank, nominally to the treasurer, and, if in order, they are paid, usually on signature of a specific attached receipt. The government will not sanction their being made payable otherwise than to order. The typical direction is : 'To

, Esq., Treasurer at the A. B. bank'. A note runs : 'The Council request that this *cheque* may be presented, etc. . . . This *cheque* requires indorsement.'

(*o*) Interpretation Act, 1889, s. 19 ; 18 Halsbury's Statutes 1001.

(*p*) 26 Halsbury's Statutes 501.

(*q*) 26 Halsbury's Statutes 411.

Such a document is not a cheque ; it is not drawn on a banker—so held in *Halifax Union v. Wheelwright (r)*. In *Hampstead Guardians v. Barclays Bank, Ltd. (s)*, ACTON, J., assumed in favour of the bank that a document of this type was a cheque and effectively crossed, but decided against the bank on the ground of negligence in opening the account.

It is not within s. 19 of the Stamp Act, 1853 (*t*), for the same reason ; nor within s. 17 of the Revenue Act, 1883 (*u*), because it is not issued by a customer of a banker and intended to enable payee to obtain payment from that banker. If it is a negotiable instrument, it can be only as a bill. Any crossing thereof is a nullity, since there is nothing to bring it within the crossed cheques sections.

Position of treasurer

In case of forged indorsement, the treasurer can only charge the council where the account has been kept at the bank and in the manner it was by the order or adoption of the council, and where the document is such that, if drawn on the bank, that bank would have been protected by statute (*w*).

With regard to the true owner the only position the treasurer could take up would seem to be this. He is not liable on the instrument. He has converted it. He is not liable for money had and received ; he has not received, he has paid it. He could tender the order back to the true owner, offering to annul cancellation of drawers' signatures, if they have been cancelled. This he is entitled to do, as having been cancelled by mistake (*y*). He should then pay the instrument on presentation, with any nominal damages, and, having paid the right man, he is entitled to charge the council. As to the first payment under the forged indorsement, he would be entitled to charge that, under *Halifax Union v. Wheelwright, ubi supra*, if the facts were as in that case. If the local authority had stopped payment he could tender the instrument to the true owner with the cancellation annulled, dishonour the instrument on presentation, and leave the true owner to sue the local authority, the instrument not having been discharged under s. 60 (*z*), because not drawn on a banker.

Some authority for the above view of the treasurer's position with regard to the true owner may be derived from *Lovell v. Martin (a)* and *Charles v. Blackwell (b)*.

(*r*) (1875), L.R. 10 Exch. 183 ; 3 Digest 172, 295.

(*s*) (1923), 39 T.L.R. 229 ; Digest Supp.

(*t*) 1 Halsbury's Statutes 543.

(*u*) 16 Halsbury's Statutes 547.

(*w*) See *Halifax Union v. Wheelwright* (1875), L.R. 10 Exch. 183 ; 3 Digest 172, 295 ; cf. *Colchester Union v. Moy* (1893), 68 L.T. 564 ; 37 Digest 212, 83 ; *Cosford Union v. Grimwade* (1892), 8 T.L.R. 775.

(*y*) S. 63 (3) ; 2 Halsbury's Statutes 67.

(*z*) 2 Halsbury's Statutes 66.

(*a*) (1813), 4 Taunt. 799 ; 6 Digest 422, 2747.

(*b*) (1877), 2 C.P.D. 151, at p. 159 ; 3 Digest 237, 665.

Position of bank

The bank which keeps the account does not seem to incur risk. If the treasurer has drawn a cheque, things follow the normal course. If he has not drawn a cheque, the order has, in all probability, been paid according to his orders. It might plausibly be contended that the bank had really nothing to do with the matter at all; that they placed certain members of the staff at the disposal of the treasurer, who acted as his and not their agent in making the payments.

The council could have no claim against the bank for having paid contrary to orders; the order is addressed not to the bank but to the treasurer. The bank has not converted the instrument; if anybody has, it is the treasurer.

The collecting bank is in the worst position of all. There is no protection under the crossed cheques sections, and as *ex hypothesi* the indorsement is forged, the collecting banker could never be holder in due course.

A good deal of the danger to all parties would be avoided if these instruments could be made payable to bearer and kept free from anything affecting their unconditional character.

G. POSTAL ORDERS AND POSTAL MONEY ORDERS

The legislation and regulations relating to this class of instrument are involved and misleading.

There are two classes of postal orders:

1. Postal orders: these cannot be for more than a guinea and are intended for home use;
2. Postal money orders: these may be for larger amounts and are available for either home or foreign purposes.

Neither is now negotiable; see *Fine Art Society, Ltd. v. Union Bank of London, Ltd.* (c). The Currency (Defence) Act, 1939, s. 2 (1), which made postal orders legal tender in the United Kingdom, was emergency legislation and was brought to an end by Order in Council as from 20th December, 1939. Both types of instrument can be crossed, but the crossing does not bring them within the crossed cheques sections, there being no legislation effecting this. If they are crossed, they will, however, be paid only to a banker; if stamped and presented by a banker, whether crossed or not, certain formalities are excused.

With regard to postal orders, the Post Office Act, 1908, s. 25 (d), enacts that:

"Any banker, or corporation, or company acting as bankers in the British Islands who in collecting in that capacity for any principal any postal order or . . . document purporting to be a postal order . . . shall not incur liability to anyone except that principal by reason of

(c) (1886), 17 Q.B.D. 705; 3 Digest 213, 528.
(d) 13 Halsbury's Statutes 48.

having received the payment . . . or presented such order or document for payment."

The liability of the principal is preserved. The group in which this section occurs is headed 'Money Orders', but by s. 24 (e) it is confined to 'Postal Orders' strictly so termed. But there is no restriction as to such postal orders being crossed. The section reproduces the proviso to s. 3 of the Post Office (Money Orders) Act, 1880, incorporated with the Post Office (Money Orders) Act, 1883.

In 1886, in *Fine Art Society, Ltd. v. Union Bank of London, Ltd. (f)*, the Court of Appeal held the bank liable to the true owner for conversion of 'Post Office orders' collected for a customer, but there is no reference in that case to statute, only to Post Office regulations. It is submitted that under s. 25 of the Act of 1908 above cited, the banker ought to be held protected against the true owner and the Post Office, in the case of present-day postal orders.

As to postal money orders, the case is different. When they are presented by a bank they are paid without examination and without advice from the place of issue in cases where such advice would otherwise be necessary before payment. But there is a Post Office regulation (g) which gives the Post Office the right at any subsequent period of returning postal money orders to the presenting bank, should they be found irregular, and of deducting the amount from any payments due or which may become due to the bank.

This is somewhat drastic procedure; there is apparently no time limit on the Post Office's action, and the method adopted is stoppage out of payments due on subsequently collected postal money orders, whether collected for the same customer or not.

The bank's only remedy is to debit the customer for whom they collected the impugned postal money order. This may or may not be effective.

The matter was before the Court of Appeal on 1st March, 1918, in *London and Provincial Bank v. Golding (h)*. A Chinese, refused payment by the Post Office of postal money orders remitted from abroad to this country, negotiated them to the defendant, a customer of the plaintiff bank. He paid them in to his account, asking the bank to advise him as soon as they were 'all right'. The bank received the proceeds from the Post Office and informed the customer accordingly. Subsequently some irregularity was discovered by the Post Office authorities and the orders were returned to the bank under the above-mentioned regulation. The bank debited the customer's account with the amount. The Chinese had left the country.

(e) 13 Halsbury's Statutes 47.

(f) (1886), 17 Q.B.D. 705; 3 Digest 213, 528.

(g) Money Order Amendment (No. 2) Regulations, 1908, No. 118, s. 5 (2).

(h) (1918), "Journal of Institute of Bankers", vol. xxxix, p. 136.

The customer declined to be debited. The Court of Appeal decided in favour of the bank.

The Institute of Bankers recommend that it should be pointed out to customers paying in these instruments that payment thereof is provisional and that the Post Office has a right to demand a subsequent refund in case of irregularity being discovered, and that naturally such refund would necessitate debiting the customer.

H. TRAVELLERS' CHEQUES AND CIRCULAR NOTES

For some time past travellers' cheques have largely superseded circular notes as the medium by which travellers obtain foreign currency while abroad. Whether either amounts to a bill, cheque, a draft on a banker or a document within s. 17 of the Revenue Act, 1883 (*j*), depends on the form in which it is expressed; and on the form and circumstances must depend the applicability of the crossing and the protection of the banker against forged indorsements. Some travellers' cheques, for instance, are drawn by the person, usually a customer, to whom they are issued, in favour of 'Self or Order'. Others, again, are drawn by the drawee bank on itself. The first type is presumably a cheque, the second a banker's draft; and both would be covered by the Bills of Exchange Acts, 1882 and 1932.

Circular notes are not in themselves negotiable instruments. 'Pay to the order of the bearer named in the letter of indication', the form of the notes in *Rhodes v. London and County Bank* (*k*), would preclude the instrument from being a bill or cheque, the payee not being indicated therein with reasonable certainty.

It is not incumbent on the person to whom circular notes or travellers' cheques are issued that he should cash all or any of them. He may return them or any of them to the banker, provided, in the case of circular notes, he at the same time returns the letter of indication, and may claim to be reimbursed or credited with the amount thereof (*l*).

The conditions on which circular notes are issued, e.g., as to keeping notes and letter of indication apart, constitute a contract between the issuing bank and the person to whom they are issued; and breach of such conditions may preclude the latter from claiming against the bank, where the loss arose from such breach (*m*).

The correspondent cannot recover against the issuing bank any money paid on a note to which the drawer's name has

(*j*) 16 Halsbury's Statutes 547; *Conflans Quarry Co., Ltd. v. Parker* (1867), L.R. 3 C.P. 1, at pp. 8, 13; 3 Digest 255, 757.

(*k*) (1880), "Journal of Institute of Bankers", vol. i, p. 770; 3 Digest 255, 758.

(*l*) *Conflans Quarry Co., Ltd. v. Parker*, *ubi supra*.

(*m*) *Rhodes v. London and County Bank*, *ubi supra*; *Hume-Dick v. Herries, Farguhar & Co.* (1888), 4 T.L.R. 541; 3 Digest 255, 759.

been forged, notwithstanding that the letter of indication, genuinely signed by the holder, was produced at the time of payment (n). Such correspondent's claim in any case only rests on the request to honour or cash the draft, inasmuch as being payee thereof he could not claim against the issuing bank. And such request only extends to drafts really signed by the person named in the letter of indication. But if the signature be authentic, it is not essential to the correspondent's recovery that the letter of indication should have been produced to him before payment.

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(n) *Conflans Quarry Co., Ltd. v. Parker, ubi supra.*

CHAPTER 8

CROSSED CHEQUES

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FOR forms of, and general law as to, crossed cheques, see Bills of Exchange Act, 1882, ss. 76–82 (a), Butterworth's *Encyclopaedia of Forms and Precedents*, vol. ii (3rd ed.), pp. 458 *et seq.*, and Chalmers' *Digest of the Law of Bills of Exchange* (10th ed., 1932).

Effect of crossing

Apart from the 'non negotiable' crossing, none of the authorised forms of crossing has any effect whatever on the negotiability of the cheque. There is a common superstition that the fact of a cheque being crossed generally or specially in some way puts a person taking it on notice of possible defects of title in his transferor; that there is some difference in the position of a holder in due course where the instrument is a crossed cheque.

Possibly the error is in part traceable to the language attributed to LINDLEY, J., in *Matthiessen v. London and County Bank* (b), and repeated in *Gordon v. London City and Midland Bank, Ltd.* (c). The learned judge is made to say (d) :

"The customer of the bank gets no better title than his transferor, not only when the cheque is marked 'Not negotiable', but when it is not so marked, if it is not an open but a crossed cheque. The bank in either case deals with the proceeds. If the bank has the cheque, it may be stopped in their hands. The customer gets no better title than the person from whom he took it."

Now what his lordship was dealing with was a cheque marked 'not negotiable', which he had just described as a new-fashioned cheque altogether, and the proceeds of such a cheque. Reference to the errata at the beginning of the volume (e) will show at once that the passage should read thus :

"The customer of the bank gets no better title than his transferor. Not only when the cheque is marked 'Not negotiable', but when it is not so marked, if it is not an open but a crossed cheque, the bank in either case deals with the proceeds. If the bank has the cheque it may be stopped in their hands. The customer gets no better title than the person from whom he took it."

(a) 2 Halsbury's Statutes 74–76.

(b) (1879), 5 C.P.D. 7; 3 Digest 240, 680.

(c) [1902] 1 K.B., at p. 266.

(d) 5 C.P.D., at p. 16.

(e) 5 C.P.D., at p. ix.

The statement as to the customer's title obviously, therefore, only applies to the 'not negotiable' crossing.

In *Smith v. Union Bank of London* (f) the Court of Appeal (g) say, with regard to a crossed cheque under the Drafts on Bankers Acts, 1856 and 1858 :

"The legislature might have enacted that any one taking a crossed cheque should take it at his peril and get no better title than his transferor had. It has not done so. We cannot say that it has by implication restrained the negotiability of the cheque."

Again they say, on the question whether the statutes have restrained the negotiability of the cheque,

"It is impossible to hold they have. There is not a word in them to that effect."

The Crossed Cheques Act, 1876, was passed the year after this judgment, and introduced the 'not negotiable' crossing. The Bills of Exchange Act, 1882, repealed and re-enacted all the above-mentioned Acts ; and, as the Court of Appeal said with regard to the earlier statutes, there is not a word in it affecting the full negotiability of a cheque crossed but not bearing the words 'not negotiable'. The introduction of the 'not negotiable' crossing is the strongest possible evidence that the other crossings have not the same effect or any analogous effect.

Apart from the 'not negotiable' crossing, the whole purview and scope of the crossed cheques sections are for and against bankers and bankers only, affording the public through them a safer method of drawing cheques.

SECTION 1.—THE 'NOT NEGOTIABLE' CROSSING

The 'not negotiable' crossing is often misunderstood, many people believing that a cheque so crossed is not transferable, but payable only to the payee through his banker. Even LINDLEY, L.J., in *National Bank v. Silke* (h), uses words which might be so interpreted. 'Not negotiable' usually does mean not transferable (i), and it is only by reference to s. 81 (j) that the true effect of the crossing is arrived at. That effect is that the cheque remains transferable, but is deprived of the full character of negotiability. However honestly and for value a transferee may take it, he cannot acquire any better title to the cheque or its proceeds, or any better right against any prior party to it, than his transferor had. So long as there is no defect of title, or failure of consideration, the cheque may pass from hand to hand just as if

(f) (1875), 1 Q.B.D. 31 ; 3 Digest 241, 683.

(g) LORD CAIRNS, C., LORD COLFRIDGE, C.J., BRAMWELL, B., and BRETT, J.

(h) [1891] 1 Q.B. 435 ; 3 Digest 205, 479.

(i) See Bills of Exchange Act, 1882, s. 8, sub-s. 1 ; 2 Halsbury's Statutes 39.

(j) 2 Halsbury's Statutes 76.

it was an open cheque, and each successive holder acquires full rights and title thereon. A cheque crossed 'not negotiable' is, in fact, as Sir Mackenzie Chalmers says, "on much the same footing as an overdue bill" (*k*). Its status is defined on the above lines by VAUGHAN WILLIAMS, L.J., in *Great Western Railway Co. v. London and County Banking Co.* (l), and the House of Lords, though reversing the decision of the Court of Appeal on other grounds, take the same view on this point (*m*).

The crossing operates equally whether a holder is suing on the cheque, or whether the true owner is suing a transferee for conversion and money had and received.

Affects cheque and proceeds

Prior to, and in, this case of *Great Western Railway Co. v. London and County Banking Co.*, it was sought to establish a distinction between the cheque and its proceeds. It was contended that s. 81 in terms only affected the title to the cheque, and that, therefore, if an innocent holder of such a cheque obtained the proceeds he could hold them as against the true owner of the cheque.

The House of Lords, however, put the rational interpretation on the section (*n*) :

"The supposed distinction between the title to the cheque itself and the title to the money obtained or represented by it seems to me to be absolutely illusory. The language of the statute seems to me to be clear enough. It would be absolutely defeated by holding that a fraudulent holder of the cheque could give a title either to the cheque or to the money."

And LORD LINDLEY (o) :

"Everyone who takes a cheque marked 'not negotiable' takes it at his own risk, and his title to the money got by its means is as defective as his title to the cheque itself."

And whether title void or voidable

Nor does it matter whether the defect of title be such as to render the cheque void or merely voidable.

"Whether the cheque was void or only voidable . . . appears to me really immaterial. Be it void or be it voidable, it was not negotiable; and by s. 81 of the Bills of Exchange Act, 1882, Huggins was not capable of giving a better title to the cheque than he had himself." (*p*)

When the holder is suing on the cheque this is clear. But LORD LINDLEY was dealing with a case where the true owner was suing a virtual transferee for value of the cheque for con-

(k) *Chalmers' Bills of Exchange*, 10th ed., p. 309.

(l) [1900] 2 Q.B., at p. 474.

(m) [1901] A.C. 414; 6 Digest 442, 2842.

(n) LORD HALSBURY, C., [1901] A.C., at p. 418.

(p) *Per* LORD LINDLEY, *ibid.* at p. 424.

(o) *Ibid.*, at p. 424.

version of it and money had and received, and the holding this crossing destructive in such case of all distinction between void and voidable settled a previously doubtful point.

Property in voidable bill

Where a fully negotiable instrument such as a bill, by reason, say, of the circumstances under which it has been obtained, is voidable but not void, even the person who has so obtained it has a temporary revocable property in it. If, prior to its revocation or repudiation, an innocent third party takes the instrument as holder for value, or even without value, subsequent revocation or repudiation cannot affect his rights or fix liability upon him (*q*). As to the respective states of circumstances which render a negotiable instrument void or only voidable see *post*, p. 233.

Voidable cheque crossed 'not negotiable'

But where the voidable instrument is a cheque crossed 'not negotiable', this distinction between void and voidable is swept away. The revocation and repudiation relate back, so to speak, to the date at which the true owner temporarily parted with the property.

However many hands the cheque may have passed through, the ultimate transferee, even if otherwise a holder in due course, cannot, as against the true owner, assert any right or title to it or the proceeds, or defend any action for conversion or money had and received. The true owner, on revocation, is put in precisely the same position with regard to him as if he had never parted with the property.

'Not negotiable' must be combined with crossing

The words 'not negotiable' have no statutory effect unless combined with one of the regular crossings. Under s. 76 (*r*) the 'additions' which constitute a recognised crossing are :

- (a) the words 'and company' or any abbreviation thereof between two parallel transverse lines ;
- (b) two parallel transverse lines simply ;
- (c) the name of a banker.

Inasmuch as any one of these additions is declared to constitute a crossing without, as well as with, the words 'not negotiable', it is obvious that it is the addition as above defined which constitutes the substantive crossing. Then s. 81 (*s*) enacts that

"where a person takes a crossed cheque which bears on it the words 'not negotiable' he shall not have, and shall not be capable of giving,

(*q*) *Tate v. Wilt and Dorset Bank* (1899), reported only in "Journal of Institute of Bankers", vol. xx, p. 376 ; 3 Digest 240, 679.

(*r*) 2 Halsbury's Statutes 74.

(*s*) 2 Halsbury's Statutes 76.

a better title to the cheque than that which the person from whom he took it had."

Here not only are the words 'not negotiable' treated as being separate from and extraneous to the crossing, but the effect of the section is made dependent on the cheque being a crossed cheque apart from the existence thereon of these particular words. There is absolutely no provision in the Act for the words 'not negotiable' without one of the recognised crossings, and as all the crossed cheques sections for the protection of the banker are confined to crossed cheques, neither paying nor collecting banker obtains any protection, either under the Bills of Exchange Act or the amending Act of 1906, with respect to a cheque bearing the words 'not negotiable' apart from a real crossing.

If the cheque be payable to order or bearer, the words 'not negotiable' by themselves written on it have no effect in hindering its full negotiability. It would, moreover, be altogether incongruous to accord to those words, without a crossing, the effect conferred on them by statute when used in conjunction with a crossing.

Position of 'not negotiable'

There is nothing in the Bills of Exchange Act requiring the words 'not negotiable' in order to be effectual to be between the two parallel transverse lines of a crossing. In s. 76 (1) (a) (i), "with or without the words 'not negotiable'" seems more properly to be read with the words immediately preceding, viz. "two transverse parallel lines", than with "and company or any abbreviation thereof", denoting that it is only the latter which must be between the lines. In s. 76 (1) (b) there is no mention of anything at all being between the lines. "Transverse lines with or without the words 'not negotiable'" is equally fulfilled whether the words, when used, are between the lines or not. In the case of specially crossed cheques, transverse parallel lines are not necessary and, if added, are purely superfluous. Sub-s. (2) of s. 76 does not prescribe them, and under s. 77 (2) (u) a holder is empowered, in the case of a cheque crossed generally before coming to his hands, not to add the name of a banker but to cross it specially. When he writes across it the name of a banker, whether between the existing lines or not, that special crossing supersedes the general crossing altogether. So that in the case of the special crossing there are no transverse parallel lines within which to put the words 'not negotiable'.

The analogy of these two sub-sections is further ground for interpreting "with or without the words 'not negotiable'" in s. 76 (1) (a) in the same sense.

“Bears on it”

Section 81 (w) does not even prescribe that the words shall be on the face of the crossed cheque. It merely says “bears on it”. It is submitted, however, that, to constitute an effective ‘not negotiable’ crossing, the words must be in some reasonable relation and collocation to the recognised crossing. It can hardly be contended that s. 81 would be satisfied by the crossing being on the face of the cheque, and ‘not negotiable’ on the back. A bearer cheque may be crossed ‘not negotiable’ with full effect, and it would be manifestly unreasonable if an innocent taker for value were to be held to have his title defeated by the existence of the words in a position where he had no reason whatever to suspect or look for them. And if “bears on it” must be interpreted “bears on the face of it” in this case, it must be equally so in the case of an order cheque. Then, assuming this, the words “with or without” in s. 76 and “may add” in s. 77 (4) appear to point to the words, when used, being in some relation or connection with the authorised crossing, not, as is sometimes the case, printed across the extreme edge of the cheque, while the crossing is in or near the middle.

Effect of ‘not negotiable’ crossing on a bill other than a cheque

The words ‘not negotiable’ written across a bill of exchange which is not a cheque mean that the instrument is not to be negotiable and do not carry the special meaning given them by s. 81; thus *Lewis, J., in Hibernian Bank, Ltd. v. Gysin and Hanson* (x). The bank sued as holders for value of a bill, accepted by the defendants, drawn in favour of the payees ‘only’, and relied on *National Bank v. Silke* (y). The judge held that that case had no application to the one he was trying. It would seem from the facts of the case that the drawers of the bill intended that the instrument should not be transferable, and the decision gave effect to this intention. It is perhaps strange that the plaintiffs, in arguing that a bill drawn to order could not be deprived of its negotiability, did not contend that the words in dispute were by virtue of the statute tied to cheques and could thus have no significance whatever in relation “to a bill which was not drawn on a banker”—which surely must be the position. However, the fact that the bill was drawn to the payees ‘only’ would seem sufficient to take it out of the category of negotiable instruments.

Question of effect, if any, of ‘not negotiable’ crossing on collecting banker

It was suggested by LORD BRAMPTON, in *Great Western Railway Co. v. London and County Banking Co.* (z), that the fact

(w) 2 Halsbury's Statutes 76.

(x) [1939] 1 K.B. 483; [1939] 1 All E.R. 166; Digest Supp.

(y) [1891] 1 Q.B. 435; 3 Digest 205, 479.

(z) [1901] A.C., at p. 422; 6 Digest 442, 2842.

of a cheque being crossed 'not negotiable', in the regular way, deprived a banker collecting it for a customer of the protection of s. 82 (a), or at least imposed some additional duty or precaution on him. This suggestion was not adopted in the *Gordon Case*, or accorded much weight by PICKFORD, J., in *Crumplin v. London Joint Stock Bank, Ltd.* (b). It was hoped, therefore, that the matter was settled. Unfortunately there are some disquieting *dicta* by LORD READING, L.C.J., in *Morison v. London County and Westminster Bank, Ltd.* (c), as to 'not negotiable' having some influence on the question of negligence.

This question is dealt with more fully hereafter under the head of "Collecting Banker".

SECTION 2.—ACCOUNT PAYEE

Words such as 'account payee', 'account of A. B.', are frequently added to the crossing of a cheque.

They are in no way authorised or recognised by the Bills of Exchange Act. Indeed where, as is usual, they are included within the transverse lines and incorporated with the crossing, it has been suggested that they invalidate the cheque, or the crossing, or are at least illegal under s. 78 (d), which enacts "a crossing authorised by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing". The words 'account payee', however, do not constitute an addition such as is contemplated by the Act. Such an addition must be one effective under the statute, if made by the proper person; whereas these words are more in the nature of a memorandum (e).

National Bank v. Silke (f) shows that such an addition to the crossing does not prevent the cheque from being transferable. In the judgments in that case the terms transferable and negotiable are, unfortunately, used somewhat indiscriminately, and no direct authority can be deduced from them as to the effect, if any, of such words as 'account of A. B.' on the negotiability of the cheque. It may be noticed, however, that the defence was based on the allegation that the cheque had been obtained by false representations and that the plaintiffs were not holders for value in due course. The defendant, who, it is to be assumed, proved the false representations, would have been entitled thereon to judgment equally whether the cheque was not transferable or only not fully negotiable; and from the fact

(a) 2 Halsbury's Statutes 76.

(b) (1913), 109 L.T. 856; 3 Digest 242, 689.

(c) [1914] 3 K.B. 356; 3 Digest 242, 690.

(d) 2 Halsbury's Statutes 75.

(e) *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K.B. 465; 3 Digest 240, 677.

(f) [1891] 1 Q.B. 435; 3 Digest 205, 479.

that the Court of Appeal affirmed the judgment in favour of the plaintiffs, it may be presumed that they did not consider the full negotiability of the cheque to have been in any way affected.

Another ground for holding this to be the correct view is that, if such words had the effect of limiting the negotiability of the cheque, the result attained by their use would be precisely equivalent to that of the 'not negotiable' crossing; and it is not permissible to attribute to one set of words the effect exclusively attached by statute to another set. Again, if the cheque be negotiable in its origin, that is, payable to order or bearer, words prohibiting transfer, or indicating an intention that the cheque shall not be transferred, are ineffectual to restrain either its transferability or negotiability. As a matter of fact it has never, of recent years, been seriously contended that the words 'account payee' have any effect on the negotiability of a cheque, and in *Underwood (A. L.), Ltd. v. Bank of Liverpool* (g) SCRUTTON, L.J., definitely adopts this view.

As to the bearing of these unauthorised additions to the crossing on the paying and collecting banker respectively, see under the headings 'Paying Crossed Cheques' and 'The Collecting Banker', pp. 211 and 290, *post*.

It may, however, be briefly stated here that, apart from the possible question of the duty of the paying banker where these words are found together with indorsements—an obviously inconsistent combination—the words only constitute a direction to the collecting banker signifying the account to which the proceeds of the cheque when received are to be placed, which he disregards at his peril. If received by that banker for anyone other than the customer indicated, such receipt is not "without negligence", and excludes the banker from the protection of s. 82 (h) even though the crossed cheque be payable to 'A. B. or bearer (j)'. Only special circumstances such as those in *Importers Co. v. Westminster Bank, Ltd.* (k), where the customer was a foreign bank and the payees that bank's customers, can rebut such accusation of negligence. It is anomalous that this power should be in the hands of a person such as the drawer, or a previous holder, who is in no manner of relation to the collecting banker, and the exercise of which is counter-balanced by no correlative safeguard to the collecting banker, as in the case of an ordinary crossing. Bankers have only themselves to blame for the present prevalence and legal recognition of this excrescence on the crossed cheque and the consequent extra trouble and risk it brings to them. There

(g) [1924] 1 K.B. 775; Digest Supp.

(h) 2 Halsbury's Statutes 76; *Beyan v. National Bank, Ltd.* (1906), 23 T.L.R. 65; 3 Digest 240, 678; *Morison v. London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356; 3 Digest 242, 690.

(j) *Per ROWLATT, J., House Property Co. of London v. London County and Westminster Bank* (1915), 84 L.J.K.B. 1846; 3 Digest 241, 685.

(k) [1927] 2 K.B. 297; Digest Supp.

were feeble efforts to introduce the practice many years ago, which might easily have been suppressed by treating the cheque as abnormal or ambiguous and so liable to return; and now any number of applications for payment require that, if the money is remitted by cheque, the cheque must be crossed in a particular way, and further that it be marked 'account payee' or 'account so-and-so'. In order that posting the cheque shall be good payment it is necessary that these requirements be strictly complied with. Thus the practice has grown, and in face of this and the decisions it would be futile to contend that the collecting banker could deal with a cheque so marked otherwise than for the account indicated, while, as above mentioned, doubts have been suggested as to the position even of the paying banker in relation thereto. A new form has recently appeared in requisitions for payment, namely, that cheques are to be marked 'account payee only'. The cheque in *Sutters v. Briggs* (1) was so marked. So were the cheques in *Importers Co. v. Westminster Bank, Ltd.* Whether a cheque so marked has any further or other significance than one marked simply 'account payee' may have to be considered some day if it becomes the custom so to mark a cheque.

Crossing by 'holder'

Apart from the special provisions as to collecting banker (see next chapter), the power to cross cheques is confined to the drawer or 'holder' (Bills of Exchange Act, s. 77 (m)). The holder need not be a holder for value, nor, apparently, a lawful holder. The word 'lawful', which occurred in the Crossed Cheques Act, 1876, is omitted in s. 77 of the Bills of Exchange Act. A thief in possession of a bearer cheque is a holder. An innocent possessor for value of an order cheque under a forged indorsement is not a 'holder' except by estoppel against an indorser subsequent to the forgery (n). If he crosses the cheque, does this afford protection to the collecting or the paying banker? Section 76 seems to contemplate the ostensible condition of the cheque as the ruling factor. If s. 77 is to be construed strictly and read into s. 76, both bankers might be deprived of protection in circumstances particularly calling for it, though the paying banker might get off under s. 60 (o). In *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank* (p), bank A. received from a customer for collection order cheques crossed generally by drawer on which the customer had forged payees' indorsements. Bank A. specially crossed these cheques to bank B. for presentation and payment. BIGHAM, J., treats this as a special crossing by

(1) [1922] 1 A.C. 1; 25 Digest 418, 213.

(m) 2 Halsbury's Statutes 74.

(n) S. 55, (2); 2 Halsbury's Statutes 64.

(o) 2 Halsbury's Statutes 66.

(p) [1904] 2 K.B. 465; 3 Digest 240, 677.

a 'holder' and says that when the cheques reached bank B. they were specially crossed to that bank. There is a good deal to be said on both sides, but the question is one best left for judicial decision if and when it arises.

Crossing other documents

As to crossing orders for payment under s. 17 of the Revenue Act, 1883 (*q*), *ante*, p. 129, and as to Dividend and Interest Warrants, *ante*, p. 137.

(*q*) 16 Halsbury's Statutes 547.

CHAPTER 9

CROSSING BY COLLECTING BANKER

THE power of crossing cheques given to a 'holder' is not confined to a holder for value. The collecting banker is a 'holder', and, apart from the special powers given him under s. 77 (a), may exercise the powers of crossing of a holder, such as that of converting a general into a special crossing, or crossing an open cheque generally. When the cheque is in a condition to be crossed specially, it has been recognised that the banker holder can, simply as holder, cross it specially to himself (b). But however the banker exercises his power of crossing, he can never, by so doing, acquire protection under s. 82 (c) in respect of a cheque coming to his hands uncrossed. Special rights are conferred on the collecting banker by the Bills of Exchange Act, s. 77, sub-ss. 5, 6.

Sub-s. 5. "Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection."

Sub-s. 6. "Where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself."

The crossing under s. 77, sub-s. 5, is the one referred to in s. 79 (d), the exception to the rule that a banker must not pay a cheque crossed specially to more than one banker.

Crossing between branches

It is not uncommon for cheques to be presented for payment crossed to two offices, a branch and the head office, of the same bank, the cheque having been transmitted from one to the other for convenience of collection. The second crossing does not seem to fall exactly within either sub-section. It is hardly a crossing 'to another banker', because for most purposes the head office and all branches constitute only one bank; and it cannot be justified under sub-s. 6, inasmuch as the cheque was not, in the first instance, 'uncrossed or crossed generally', but specially.

But the objection seems to be met by the consideration that if sub-s. 5 does not apply, s. 79 must be read in the same

(a) 2 Halsbury's Statutes 74.

(b) *Sutton v. Briggs*, [1922] 1 A.C. 1; 25 Digest 418, 213.

(c) 2 Halsbury's Statutes 76. (d) 2 Halsbury's Statutes 75.

sense, and the paying bank, in paying such a cheque, would not be paying it crossed to two bankers, but only one. Conversely, if the bankers are to be treated as two under s. 79, the second crossing is to another banker for collection within sub-s. 5.

One bank employing another for collection

The system of one bank employing another for collecting purposes, recognised by this sub-s. 5, suggests some curious questions. Suppose a cheque, crossed specially to bank A., is paid into that bank for collection by a customer who has no title to it, the payee's indorsement having been forged. Bank A. specially cross it again to bank B. for collection. Bank B. collect it and transmit the proceeds to bank A. Bank A. are protected as against the true owner under s. 82 (c). The true owner gets hold of the paid cheque, and discovers from the second crossing that it was presented by bank B. Bank B. are at least equally guilty with bank A. of conversion of the cheque; and it is difficult to see how they are entitled to protection under s. 82, inasmuch as they did not receive payment for a customer, the customer being bank A.'s, not theirs, and the *quasi* obligation to collect, which is the foundation of protection, not applying in their case.

Section 82 has been said to contemplate and provide only for the simple case of one bank receiving a crossed cheque for collection from a customer and collecting the proceeds directly itself (f). Section 77, sub-s. 5, ss. 79 (1) and 80, on the contrary, contemplate employing another bank as agent for collection. Bank B. would in all probability be entitled to indemnity from bank A., either on the ground that they were acting as agent of the latter, or on the ground that they had done an act lawful in itself at the request of bank A. whereby they had suffered loss, or that bank A. had represented the title to the document as good or agreed to indemnify bank B. if it were not. Section 82 only protects bank A. against the true owner, not anybody else.

In the example supposed, a second special crossing has been introduced, but this does not affect the main question; and the same difficulty might arise in every case where the collection of a crossed cheque is delegated by one bank to another.

It may be presumed there is some answer to the suggested danger, as it appears unreasonable that a bank, by availing itself of a necessary and recognised course of business, should indirectly incur liabilities equivalent to those it was the object of s. 82 to remove, or that the bank, whose employment

(e) *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K.B. 465; 3 Digest 240, 677.

(f) See *Gordon's Case*, [1902] 1 K.B., at p. 262; affirmed, [1903] A.C., at p. 246; 3 Digest 240, 676.

seems recognised by s. 77, sub-s. 5, should not be directly protected against the true owner; but the answer is not very obvious. Probably it lies in the extension of the word 'customer' to bank A., as in the case of the foreign bank in *Importers Co. v. Westminster Bank, Ltd.* (g), assisted by the use of the word 'collection' in s. 77, sub-s. 5, and the account which would necessarily exist between banks A. and B. As BANKES, L.J., put it in that case (at p. 305): "In this case this class of business of collecting cheques was done between bank and bank, and it seems to me impossible to contend, as a matter of law, that the bank for which the respondents were doing the business were not, in reference to that business, their customer."

ATKIN, L.J., was equally definite. At p. 310 he said: "... it seems to me that if a non-clearing bank regularly employs a clearing bank to clear its cheques, the non-clearing bank is the 'customer' of the clearing bank".

Transmission between branches

The case of a bank transmitting a crossed cheque to another branch or the head office is not open to the same objections. There the whole system would be treated as one bank, and the protection of s. 82 would enure through all stages of the operation of collection.

Banker crossing a cheque to himself under s. 77, sub-s. 6

Section 77, sub-s. 6, provides:

"Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself."

It has been contended that this section enables a banker, by crossing a cheque sent to him uncrossed for collection, to obtain the protection of s. 82, and it has been stated on good authority that the sub-section was specially introduced into the Act for this purpose (h).

It has been suggested that the word 'sent' pointed to this being the true interpretation; as, in cases where the cheque was 'brought' by the customer, the banker could get him to cross it, which he could not do when it was sent, and he was therefore allowed to do it himself.

But this view of the sub-section cannot be maintained. It was conclusively rejected in *Gordon v. Capital and Counties Bank, Ltd.* (j). If the Legislature had any such intention, it should have been much more definitely expressed. In the absence of unambiguous terms, the decision in the *Gordon Case* was inevitable, for the following reasons.

(g) [1927] 2 K.B. 297; Digest Supp.

(h) See *Questions on Banking Practice*, 8th ed. (1930), Question 336.

(j) [1902] 1 K.B. 242; affirmed, [1903] A.C. 240; 3 Digest 240, 676.

Though, on another point, as stated in chapter 8, the House of Lords, in the *Gordon Case*, ignored the rule of limiting statutory protection of bankers to risks imposed on them directly or indirectly by legislation, they recognise that the whole system of protection for bankers under the crossed cheques sections must be regarded as confined to the risks imposed upon them by the introduction of crossed cheques. A banker was definitely forbidden to pay crossed cheques contrary to the crossing by the Drafts on Bankers Act, 1858, and the Crossed Cheques Act, 1876. This rendered the intervention of a banker imperatively necessary in the case of crossed cheques. Correlative protection was first accorded by the proviso to s. 12 of the Act of 1876. The dropping of the direct prohibition in the Bills of Exchange Act, 1882, might be put forward as having removed the absolute necessity of the intervention of the collecting banker. It was, in fact, argued that this was so in *Aronowitz v. R. (k)*, but the case was settled and the point not decided, and reasons exist, directly derivable from the Act, which render it impossible for the holder of a crossed cheque to obtain payment except through a banker. The obligation of the banker to collect remains, therefore, and justifies the correlative protection continued by s. 82 of the Bills of Exchange Act, 1882 (*l*). There is, theoretically, no such necessity in the case of an uncrossed cheque, and the banker's intervention for its collection is voluntary (for the convenience of the customer), and stands exactly on the same footing as it did prior to any of the Crossed Cheques Acts, and is entirely outside the scope of either those enactments or the crossed cheques sections of the Bills of Exchange Act (*m*).

This view is strengthened by the sub-section embracing not only uncrossed cheques but cheques crossed generally, as to which the banker can need no additional protection.

In the *Gordon Case* COLLINS, M.R., held (*n*) there was no protection on the further ground that, by taking the cheques from a wrongful holder, the bank dealt with them in a manner amounting to conversion before crossing them, and could not purge their conversion by subsequently crossing them to themselves. This view is not consistent with that of the House of Lords in the same case, which recognised the obvious deduction that, where s. 82 gives protection in respect of the receipt of the money, that protection necessarily covers all steps taken in the ordinary course of business for the purpose and in the process of obtaining that result. To give effect to this it is permissible, indeed necessary, to ignore the intervention of forged indorsement.

(k) (1927), *Times*, Nov. 18th and 19th.

(l) 2 Halsbury's Statutes 76.
(m) See per COLLINS, M.R., in *Gordon v. London City and Midland Bank, Ltd.*, [1902] 1 K.B., at p. 263; per STIRLING, L.J., at p. 280; per LORD MACNAGHTEN, [1903] A.C., at p. 246; 3 Digest 240, 676.

(n) [1902] 1 K.B., at p. 272.

What is effect of s. 77, sub-s. 6 ? (o)

Unless it was designed to enable the banker to protect himself, it is difficult to say what this sub-section really means or does. Sir Mackenzie Chalmers suggests (Bills of Exchange, 10th ed., p. 306) in a note to it :

"Sub-section 6 is new. It may protect the banker from possible frauds by his clerks."

COLLINS, M.R., says, in *Gordon's Case* (p) :

"That is a facility given for the purpose of affording additional protection during the process of collection after the crossing of the cheque."

In the same case, STIRLING, L.J. (q), says :

"... where a banker simply acts as agent for the collection of a cheque, he may protect himself from dishonesty by crossing the cheque specially to himself ;"

In the same case LORD LINDLEY says that the sub-section might be useful if an indorsement were forged after a crossing (r).

Taking first the view suggested by STIRLING, L.J., and Sir Mackenzie Chalmers, that the object of the crossing is to protect the banker himself against dishonesty, it is not very clear what the danger is or how it is in any way met by the crossing. If the cheque itself were stolen by one of the banker's clerks, or by a stranger, the banker would presumably not be liable, unless it were stolen by the clerk, and the banker had previous reason to suspect him. If the money were received in the ordinary course of business, and then embezzled by an employee of the banker, the banker would probably be liable (s); but this liability would attach just the same, or even more distinctly, if the cheque were paid in strict conformity with the crossing.

Next, in no event whatever could the crossing banker have any remedy against the paying banker for paying in contravention of the crossing. The crossing banker, as *ex hypothesi* only collecting the cheque, is in no sense the true owner, to whom alone the remedy is given by s. 79 (t).

COLLINS, M.R., does not in terms state that the supposed protection is for the banker himself. It is conceivable that he had in view protection of the true owner. Probably the true owner would have a remedy against the paying banker, if he paid in contravention of such crossing, for any loss thereby sustained.

It seems somewhat far-fetched that the banker should take the trouble thus to afford the true owner, even if he be his

(o) 2 Halsbury's Statutes 75.

(q) *Ibid.* at p. 280.

(r) *Mackery v. Ramsays Bonars & Co.* (1843), 9 Cl. & Fin., per LORD COTTENHAM, at p. 848; 3 Digest 174, 306.

(s) 2 Halsbury's Statutes 75.

(p) [1902] 1 K.B., at p. 272.

(r) [1903] A.C., at p. 250.

customer, a protection the true owner has not thought fit to take for himself. If the danger suggested by STIRLING, L.J., and Sir Mackenzie Chalmers exists, it must emanate from the true owner, and it would be entirely optional with him which banker he went against. Combining the three views, the curious result accrues that the collecting banker gives the true owner an alternative remedy against the paying banker if he pay contrary to the crossing, and, in the case of a cheque originally uncrossed, the paying banker additional protection if he pay in accordance with the crossing, but gets nothing at all himself by this operation, since, as shown above, he acquires no claim or remedy over against the paying banker. With respect to LORD LINDLEY's *dictum*, it is difficult to see what inducement there could be to anyone to forge a further indorsement on a cheque already in order for collection.

In *Sutters v. Briggs* (u) LORD BIRKENHEAD, L.C., delivering the judgment of himself and LORDS BUCKMASTER and CARSON, deals with the question as follows :

"The argument on this point (w) is that as the sub-section gives a banker power to cross a cheque, sent to him for collection, specially to himself, it necessarily follows that he would not have that power apart from the sub-section, and is not a holder. It is implicit in such an argument that although a banker who is acting as an agent for collection has the major right of crossing a cheque specially to himself, he does not possess the minor rights of crossing it generally, or specially to another banker, or of making it not negotiable. Therefore a country banker to whom a cheque is sent for collection may not cross it specially to the bankers acting as his agents even for the purpose of safeguarding it in transit. A decision involving such a consequence would effect a revolution in banking practice. . . . This sub-section, which was not in s. 5 of the Bills of Exchange Act, 1876, [*sic*, but must be Crossed Cheques Act, 1876] was possibly inserted *ex abundanti cautela*, lest it might be argued that the practice was unlawful as constituting a breach of the relation of principal and agent, inasmuch as it recognised only payment made to the agent. Nor does s. 82 afford assistance to the appellant." [Quotes it.] "I cannot myself understand how any inference can be drawn from this section that a banker who receives payment as agent for collection is not a 'holder'. On the contrary, the opposite inference is far more plausible, namely, that the protection became necessary because he is a holder and as such liable to an action for conversion. The appellant's attempt to draw such an inference is further shown to be baseless by the fact that the Bills of Exchange (Crossed Cheques) Act, 1906, confers the same protection on bankers who by their action have made themselves not merely 'holders' but 'holders in due course' (y). . . . Moreover, if bankers are not holders of cheques for which they are agents for collection only, they derive no benefit from s. 27, sub-s. 3 (z), as the sub-section does not apply, even where there is a lien, to a person who is not a holder."

The object, if any, of s. 77, sub-s. 6, could therefore be just

(u) [1922] 1 A.C. 1, at pp. 16-18; 25 Digest 418, 213.

(w) S. 77, sub-s. 6, and s. 82.

(y) *Gordon Case*, and BOWEN, L.J., in *National Bank v. Silke*, [1891] 1 Q.B. 435, at p. 439; 3 Digest 205, 479

(z) 2 Halsbury's Statutes 47.

as well attained by a special crossing to the second bank by the first, as holder.

When once the idea of the collecting banker getting by means of this sub-section any protection under s. 82 is exploded, there can be no ground for suggesting any distinction between cheques 'sent' or 'brought' for collection; and, by virtue of the sub-section or his right as holder, the banker must be entitled to cross them specially to himself, by whatever means they reach his hands.

Banker's crossing stamp

It is the custom of bankers to stamp their names on the face of all cheques passing through their hands for collection, primarily for Clearing House and identification purposes. In some cases this cannot operate as a crossing, *e.g.*, when the cheque is already crossed specially to that bank. In other cases, as previously stated, it is recognised as a crossing to that bank, as well as a means of identification.

CHAPTER 10

THE PAYING BANKER

SUMMARY—

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THE expression 'the paying banker' is a convenient one to denote the banker in his relation to cheques drawn on him by the customer; more especially when it is desired to consider his position as compared with that of the 'collecting banker', hereinafter dealt with. The expression is also applicable to the banker with regard to bills domiciled with him by the customer for payment, usually by their being accepted payable at the bank.

Paying cheques

With regard to cheques, the paying banker's main obligation is that he is bound to pay cheques drawn on him by a customer in legal form, provided he has in his hands at the time funds of the customer sufficient and available for the purpose. Such funds are in reality only represented by the unencumbered debt from the banker to the customer, otherwise the ascertainable credit balance on current account; but it would be hypercritical to vary the accepted formula for the sake of such technical accuracy.

The obligation to pay cheques is usually spoken of as an obligation superadded in the case of a banker to the relation of debtor and creditor (a).

"The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques when the account is in credit." (b).

(a) *Foley v. Hill* (1848), 2 H.L. Cas. 28; 3 Digest 168, 272.

(b) LORD FINLAY, L.C., in *London Joint Stock Bank, Ltd. v. Macmillan and Arthur*, [1918] A.C. 777; 3 Digest 233, 644.

Or the obligation may be regarded as a leading constituent of the implied contract between banker and customer (c).

Question of banker's negligence

One preliminary question arises as to the banker's liability in paying cheques. Before the Bills of Exchange Act, it was laid down that a banker, in paying cheques, must not be negligent and could not charge his customer with money lost through his negligence (d).

Of course the banker must not be negligent ; it is as much part of his contract to take care as it is of the customer's, and it is true that as a general rule he has himself to bear loss accruing from his negligence (e). But in the very connection in which the question might most possibly arise, namely, the payment of a cheque with forged indorsement, the wording of s. 60 (f) would seem to introduce an exception or saving in favour of the banker and hold him immune if he has paid in good faith, albeit negligently. Section 60 protects the banker in such case if he pays the cheque "in good faith and in the ordinary course of business" ; s. 90 (g) says :

"A thing is deemed to be done in good faith within the meaning of this Act where it is in fact done honestly, whether it is done negligently or not."

In *Carpenters' Co. v. British Mutual Banking Co., Ltd.* (gg), counsel for the bank sought to avail himself of the above paragraph in support of his contention that the words "in the ordinary course of business" are not inconsistent with negligence on the part of the banker. But the exception referred to holds good only in relation to payment. Where, as in that case, the banker is both collecting and paying, the question of negligence is important and, as was held (h), may deprive the banker of his defence in an action for conversion, notwithstanding that in paying he acted in accordance with his mandate.

It is to be noticed that in s. 79 and s. 80 (i), payment by the banker to be protected must be "in good faith and without negligence", and this difference, together with the interpretation of good faith in s. 90, seems to imply that "ordinary course of business" is not, in this particular instance, incompatible with negligence. "Ordinary course of business" is a somewhat vague expression ; there can be no ordinary course of business in extraordinary circumstances. As LORD HALSBURY said in *Bank of England v. Vagliano Brothers* (j) :

(c) See per ATKIN, L.J., in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K.B. 110 ; 21 Digest 639, 2188.

(d) *Bellamy v. Marlboroughs* (1852), 7 Exch. 389 ; 3 Digest 240, 681 ; *Carlan v. Ireland* (1856), 5 E. & B. 765 ; 6 Digest 442, 2838.

(e) Cf. *Westminster Bank, Ltd. v. Hilton* (1926), 136 L.T. 315 ; Digest Supp.

(f) 2 Halsbury's Statutes 66. (g) 2 Halsbury's Statutes 79.

(gg) [1938] 1 K.B. 511 ; [1937] 3 All E.R. 811, C.A. ; Digest Supp.

(h) *Per GREEN, L.J.*, at p. 529.

(i) 2 Halsbury's Statutes 75.

(j) [1891] A.C., at p. 117 ; 6 Digest 13, 37.

"I do not know what is the usual course among bankers, and I should doubt whether in such a matter it would be possible to affirm that any particular course was either usual or unusual in the sense that there is some particular course to be pursued when circumstances occur necessarily giving rise to suspicion."

The view that a bank may act in the ordinary course of business so as to claim the protection of s. 60 and yet be negligent is supported by SLESSER and MACKINNON, L.JJ., in the *Carpenters' Co. Case* (jj). The former said: ". . . negligence does not necessarily preclude the protection of s. 60, a view made clear, in the case of the other requirement, of good faith, by s. 90 of the same Act . . ."; and he referred to the above passage by LORD HALSBURY. MACKINNON, L.J., said: "A thing that is done not in the ordinary course of business may be done negligently; but I do not think the converse is necessarily true. A thing may be done negligently and yet be done in the ordinary course of business."

In 1904, in *Brighton Empire and Eden Syndicate v. London and County Bank* (k), the bank had cashed an order cheque drawn by the plaintiffs on which the indorsement had been forged by a servant of the plaintiffs, whose handwriting was alleged to be well known to the bank and which it was said it was negligence in the bank not to recognise. The Lord Chief Justice, LORD ALVERSTON, held there was no case with regard to this cheque, as no want of *bona fides* was proved against the bank, who were therefore protected by s. 60. It would therefore seem that negligence does not preclude the protection of that section.

However, the bank were held liable for negligence in allowing the same servant to make entries of sums and dates in the plaintiffs' pass book and having neglected to check the entries so made, whereby he deceived the plaintiffs and their accountants. This point the LORD CHIEF JUSTICE left to the jury on the question of negligence, and they found for the plaintiffs with £482:10:1 damages. This supports the general principle that bankers are liable for negligence.

There are intimations in some of the older cases that the reason why a banker cannot charge his customer with a cheque to which that customer's signature has been forged is that a banker is bound to know his customer's signature and that it is his negligence in not detecting the imitation which disentitles him to debit the customer. The fallacy of this view was exposed by MATHEW, J., in *London and River Plate Bank v. Bank of Liverpool* (kk). The true reason, of course, is that the banker cannot charge the customer with moneys paid away without his mandate or authority.

(jj) [1938] 1 K.B., at p. 534; [1937] 3 All. E.R. 811.

(k) (1904), Times, March 24th, p. 13.

(kk) [1896] 1 Q.B. 7; 6 Digest 107, 737.

SECTION 1.—PRESENT STATE OF THE LAW

In the earlier editions of this book it was only possible to deal with the respective rights and liabilities of banker and customer with regard to the drawing and payment of cheques as matter of argument and opinion. That was due to the chaotic state of the law, mainly attributable to the decision of the Privy Council in *Colonial Bank of Australasia, Ltd. v. Marshall* (l). That decision professes to be based almost entirely on the previous judgment of the House of Lords in *Scholfield v. Londesborough (Earl)* (ll). Especially as LORDS HALSBURY and MACNAGHTEN were members of the Court on both occasions, one would have expected to find that the latter case really did afford a *ratio decidendi* for the former.

As now conclusively shown by the judgment of the House of Lords in *London Joint Stock Bank, Ltd. v. Macmillan and Arthur* (m), that is not so. *Scholfield v. Londesborough (Earl)* had no bearing or application whatever on or in *Colonial Bank of Australasia, Ltd. v. Marshall*.

Scholfield v. Londesborough (Earl) was the case of holder suing acceptor for the face value of a bill which had been raised by forgery after acceptance. *Colonial Bank of Australasia, Ltd. v. Marshall* was the case of a customer refusing to be debited by the bank with the increased amount of cheques, the forgery having been facilitated by the customer's negligently signing the cheques when they showed blank spaces available for the insertion or alteration of the amount payable.

Of course in both of these cases the familiar *Young v. Grote* (n) and "the modified doctrine of Pothier" figured largely.

Scholfield v. Londesborough

In *Scholfield's Case* they were inapplicable since they turn on the question of mandant and mandatory, principal and agent, a relation they recognise as obtaining between customer and banker, but which there is no ground for asserting as between acceptor and the indeterminate future holder of a bill. The House of Lords in *Scholfield v. Londesborough (Earl)* most clearly and carefully pointed this out, and, save for some criticisms by LORD HALSBURY as to the reasons of the decision in *Young v. Grote*, which have always been matter of discussion, and a curious mistranslation of Pothier's French, altering the whole sense, at the critical point of a long quotation, by the same learned Lord, the judgments are an indirect confirmation of the principle laid down by the earlier authorities, that the customer is the mandant or principal, the banker the manda-

(l) [1906] A.C. 559; 3 Digest 233, 643.

(ll) [1896] A.C. 514; 6 Digest 384, 2518.

(m) [1918] A.C. 777; 3 Digest 233, 644.

(n) (1827), 4 Bing. 253; 3 Digest 232, 640.

tory or agent, in the matter of drawing and paying cheques ; that consequently the banker is entitled to the full protection of one who has to obey the orders of another, with the natural corollary that if, by the negligence of the customer in drawing or issuing his cheques, the banker is misled and loss ensues, that loss is to be borne by the customer and not the banker.

Colonial Bank of Australasia, Ltd. v. Marshall

In *Colonial Bank of Australasia, Ltd. v. Marshall* this case is vouched as authority for the very positions it was careful to differentiate. The Board ignored the fundamental distinction between the cases, despite the signposts set up in *Scholfield's Case*. The main ground of the decision, however, was that the House of Lords in *Scholfield's Case* had two questions before them :

1. was there a duty ?
2. if so, was there a breach of that duty, in other words, negligence ?

and that, as the House of Lords decided in favour of the acceptor, they must be taken to have held that, assuming the duty, the negligent signing was not a breach of that duty, and not negligence ; that the duty set up in either case was the same, and the breach of it the same, therefore the one case was on all fours with the other—not a very conclusive argument. The House of Lords having found there was no duty, there was no particular reason why they should proceed to consider whether, if there had been a duty, there would have been a breach of it. Incidentally, the Judicial Committee cast aspersions on *Young v. Grote (o)* and uttered the usual sophisms as to its not being anybody's duty to anticipate forgery. The concluding portion of the judgment is as follows :

"The principles there [*Scholfield v. Londesborough (Earl)*] laid down appear to their Lordships to warrant the proposition that whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilise them for the purpose of forgery is not by itself any violation of that obligation."

And so they decided against the bank, and the decision carried greater weight and authority by reason of the participation therein of LORDS HALSBURY and MACNAGHTEN, two of the four members who composed the Board. On the law as then laid down, the banker was for twelve years left in a dangerous and helpless condition. His position as a mandatory or agent, the existence of any duty towards him on the part of the customer, was either denied or made so nebulous that nothing could be predicated of it and no reliance placed on it. One thing only was clear : that the customer could draw cheques

with any amount of blanks facilitating forgery, and if the opportunity was taken advantage of to increase the amount and the banker paid it in good faith and without negligence, it was he and not the customer who had to bear the loss, so long as the customer was not acting fraudulently.

It is proposed to return to this question hereafter in direct connection with forgeries; it is partially dealt with here because, so long as the *Colonial Bank of Australasia Case* remained unchallenged, it was impossible to formulate any duty owing by the customer to his banker, and because a review of the previous situation seems desirable for the understanding and appreciation of the rational position now occupied by the banker under the judgments now to be noticed.

London Joint Stock Bank, Ltd. v. Macmillan

In *London Joint Stock Bank, Ltd. v. Macmillan and Arthur (oo)* Macmillan and Arthur had a clerk who was in the habit of preparing and presenting for signature to one of the partners cheques for petty cash of small amount. On the occasion in question, this clerk, with a view to fraud, prepared a cheque, inserting a 2 in the space for figures, with available blanks before and after the numeral, and putting absolutely nothing where the sum in writing should appear. The cheque was to bearer and uncrossed. This inchoate instrument he tendered to one of the partners who was just leaving the office, who, being in a hurry, failed to notice anything unusual, and being told it was for petty cash and that two pounds would be sufficient, forthwith signed it. The clerk filled in "One hundred and twenty pounds" in writing, inserted a 1 before the 2 and a 0 after it, presented it to the bank, received the £120, and absconded. The judge at the trial and the Court of Appeal decided against the bank; the House of Lords reversed this decision and gave judgment for the bank. They rehabilitated *Young v. Grote (p)* and "the modified doctrine of Pothier", they swept away *Colonial Bank of Australasia, Ltd. v. Marshall* as a miscarriage of justice, and put the paying banker into a sound and rational position on much the same lines as those later described and defined by ATKIN, L.J., in *Joachimson v. Swiss Bank Corporation (pp)*.

LORD FINLAY, L.C., in *London Joint Stock Bank, Ltd. v. Macmillan and Arthur*, said :

"A cheque drawn by the customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care to prevent the banker being misled. If he draws a cheque in a manner which facilitates fraud, he is guilty of a breach of duty between himself and the banker, and he will be responsible to the banker for

(oo) [1918] A.C. 777; 3 Digest 233, 644.

(p) (1827), 4 Bing 253; 3 Digest 232, 640.

(pp) [1921] 3 K.B. 110; 21 Digest 639, 2188; ante p. 30.

any loss sustained by the banker as a natural and direct consequence of this breach of duty."

To the argument that loss by forgery is not a natural or direct consequence of such negligence or breach of duty, and that either as breaking the connection between the breach and the consequence or as negating negligence, crime was a remote contingency which no one was bound to anticipate, he replies as follows :

"As the customer and the banker are under a contractual relation in this matter, it is obvious that, in drawing a cheque, the customer is bound to take usual and reasonable precautions to prevent forgery. Crime is, indeed, a serious matter, but everyone knows that crime is not uncommon. If the cheque is drawn in such a way as to facilitate or almost invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote, but a very natural consequence of neglect of this description."

Of *Young v. Grote* (q) he says :

"*Young v. Grote* was decided nearly a hundred years ago. It has been often approved by many of our greatest judges, and with the exception of a recent case in the Privy Council, with which I shall deal later on, there has never been a decision inconsistent with it but for that now under appeal."

The case in the Privy Council referred to was, of course, *Colonial Bank of Australasia, Ltd. v. Marshall*. The subsequent dealing with it was to declare it an erroneous decision. And LORD FINLAY continues :

"In my opinion the decision in *Young v. Grote* is sound in principle and supported by a great preponderance of authority, and must be treated as good law."

The judgments in the *Macmillan Case* are naturally confined in terms to the drawing of cheques. But with regard to bills, accepted by a customer payable at his banker's, the relation of mandant and mandatory, of principal and agent, obtains at least as much as in the case of cheques. There is a contractual relation or implied contract binding the banker to pay such bills on behalf of the customer (qq). Moreover, the banker is denuded of any statutory protection in paying such bills. There is, therefore, all the more ground and reason for holding him entitled to full consideration and, if necessary, indemnity from the customer. *Mutatis mutandis*, it may therefore be taken that the principles of the *Macmillan Case* apply equally to domiciled bills.

One of the differences to be borne in mind is that the drawer, not the acceptor, is master of the form of the bill. In this connection the opinions of LORD ESHER and RIGBY, L.J., in the Court of Appeal in *Scholfield v. Londesborough (Earl)*, that, admitting the acceptor's duty to take care, his omission

(q) (1827), 4 Bing. 253 ; 3 Digest 232, 640.

(qq) See *Bank of England v. Vagliano Brothers*, [1891] A.C. 107 ; 6 Digest 31, 203.

to detect or notice available blanks in the bill tendered to him for acceptance was not negligence, must be taken into account.

The exposure in the *Macmillan Case* of the misapplication of this opinion and the subsequent judgment of the Privy Council, exemplified in *Colonial Bank of Australasia, Ltd. v. Marshall*, does not necessarily impugn its essential soundness. The duty to take care in accepting, non-existent towards the indeterminate holder, doubtless does exist towards the banker at whose bank the bill is, by agreement, accepted payable; whether the non-detection of opportunities for fraud is a breach of such duty would be a question for a jury dependent on the obviousness and flagrancy of such opportunities, as compared with the state of affairs in *Scholfield v. Londesborough (Earl)*, while the recognition in *Macmillan's Case* of the duty to anticipate and obviate forgery tends to minimise the weight of the *dicta* in *Scholfield v. Londesborough (Earl)*, which rule it out as entering into the question of negligence.

In *Vagliano's Case* (r) LORD SELBORNE says :

"It is not disputed that there might, as between customer and banker, be circumstances which would be an answer to the *prima facie* case that the authority was only to pay to the order of the person named as payee upon the bill, and that the banker can only charge the customer with payments made pursuant to that authority. Negligence on the customer's part might be one of those circumstances."

Inasmuch as Lord Selborne enumerates other circumstances—no real payee, representation made by the customer to banker, and so forth—it is not unreasonable to suppose that the negligence to which he alludes is in reference to the form of the bill when accepted.

The extension of the duty of the drawer of a cheque, as laid down in *Macmillan's Case*, to cover the point of leaving no space after the payee's name, was refused by the Court of Appeal in *Slingsby v. District Bank, Ltd.* (s). That was a case of the material alteration of a cheque, payable to John Prust & Co., by the fraudulent addition of 'per Cumberbirch and Potts'. It was argued that the drawers of the cheque were negligent in their duty to the paying banker in not drawing a line in the blank after the payees' name and had thus enabled the fraud to be committed. Reference was made to LORD FINLAY'S statement in *Macmillan's Case* of the relation between banker and customer to the effect that "the customer is bound to take usual and reasonable precautions to prevent forgery". SCRUTTON, L.J., was satisfied, however, that at that time it was not a 'usual precaution' to draw lines before or after the name of the payee. "If that sort of case became frequent it might become a 'usual precaution', but no banking witness had ever heard of a case like this before." On this it need only be said that the precaution in question

(r) [1891] A.C., at p. 124.

(s) [1932] 1 K.B. 544 ; Digest Supp.

in *Macmillan's Case* is probably no more 'usual' than the one it was attempted to plead in *Slingsby v. District Bank, Ltd.* But it is the principle which is important and another case on the lines of *Slingsby v. District Bank, Ltd.* might well be decided differently.

SECTION 2.—THE DUTY TO PAY CHEQUES

Every authority from *Foley v. Hill* to *Joachimson v. Swiss Bank Corporation* and the Bills of Exchange Act alike recognise that the banker's primary function and duty is to honour his customer's cheques, provided the state of the account warrants his doing so and there is no legal reason or excuse to the contrary. Apart from this contractual obligation, or as a consequence thereof, the paying banker must remember that his customer's credit is or may be seriously injured by the return of one of his cheques dishonoured, and the smaller the cheque, the greater the possible damage to credit (i).

Theoretically, substantial damages may be given against the bank without proof of actual loss to the customer (u), and in many cases large sums have been awarded. But a more reasonable view appears now to have gained favour. It is contended that the presumption of necessary serious injury only applies where the customer is a business man, and that, at least in other cases, actual damage must be pleaded and proved (v). In a case of this sort, *Evans v. London and Provincial Bank*, before LORD READING, L.C.J., reported in *The Times* of 1st March 1917, the wife of a naval officer sued for the dishonour of a cheque. The LORD CHIEF JUSTICE directed the jury that the only question was what amount of damages was due to the lady for the mistake the bank had undoubtedly made, though she had not suffered any special damage. If necessary, he said, the question of law which might arise could be discussed thereafter. The jury returned a verdict of one shilling damages, the foreman saying they did not consider that Mrs. Evans had suffered anything more than annoyance.

Again, in *Cox v. Cox & Co.*, reported in *The Times* of 18th March 1921, where a cheque had been returned marked 'N.S. Present again in a few days', the plaintiff sued for dishonour of the cheque and for libel. The bank paid £50 into court in respect of the breach of contract in dishonouring the cheque, which plaintiff accepted and continued the action for the alleged libel. The jury found for the defendants, and DARLING, J., intimated that he did not think the £50 would have been recoverable, if not paid in.

(i) *Marzetti v. Williams* (1830), 1 B. & Ad. 415; 3 Digest 217, 549.

(u) *Rolin v. Steward* (1854), 14 C.B. 595; 3 Digest 217, 550.

(v) Cf. *Wilson v. United Counties Bank, Ltd.*, [1920] A.C. 112, 132; 17 Digest 155, 562.

In an Irish case, *Kinlan v. Ulster Bank, Ltd.* (w), a customer presented a cheque drawn by and payable to himself. Payment was refused, though there were funds to meet it. The Supreme Court of Eire held there was no defamation. The defendants had paid £10 into court, presumably to cover breach of contract.

In a recent case, *Gibbons v. Westminster Bank, Ltd.* (x), LAWRENCE, J., felt himself bound by the authorities (y) and, further, held that the corollary of the proposition laid down by them is the law, "that a person who is not a trader is not entitled to recover substantial damages unless the damages are alleged and proved as special damages".

As to answers on cheques, see *post*, p. 187 under that heading.

SECTION 3.—CONDITIONS UNDER WHICH THE BANKER IS BOUND TO PAY

As specified or implied in all the statements of a banker's obligation to honour his customer's cheques, that obligation is circumscribed by certain necessary conditions.

First, as to the character of the cheque.

Cheque must be legal

It must be a legal one (z). It might be argued that an unstamped cheque came within the definition of an illegal one, or that anyway the banker was bound or entitled to refuse payment on the ground that if he paid, he would incur a £10 penalty under s. 38 of the Stamp Act, 1891 (a). Possibly he would be technically justified in so doing, but in view of the proviso (2) to that section, which entitles him to affix the necessary adhesive stamp, pay the cheque, and charge the stamp in account with the drawer, or deduct it from the amount paid, it would be exceedingly arbitrary and unwise for a banker to adopt so extreme a course.

Regular in form

Next, the cheque must be regular and unambiguous in form. Prior to the *Macmillan Case*, the only direct authority on this point was a *dictum* of LORD BLACKBURN's in 8 A.C., at p. 864, to the effect that the banker was only bound to pay "cheques properly drawn".

(w) [1928] I.R. 171; Digest Supp.

(x) [1939] 2 K.B. 882; [1939] 3 All E.R. 577; Digest Supp.

(y) *Marzetti v. Williams* (1830), 1 B. & Ad. 415; 3 Digest 217, 549; *Rolin v. Steward* (1854), 14 C.B. 595; 3 Digest 217, 550; *Bank of New South Wales v. Milvaln* (1884), 10 V.L.R. 3; 3 Digest 220, w; *Kinlan v. Ulster Bank, Ltd.*, [1928] I.R. 171; Digest Supp.; and *Addis v. Gramophone Co., Ltd.*, [1909] A.C. 488, in which last it was held that the exception as to the general rule as to damages ought not to be extended.

(z) *Emanuel v. Roberts* (1868), 9 B. & S. 121; 3 Digest 213, 531.

(a) 16 Halsbury's Statutes 629.

Bankers had long protested against the aberrations of business firms who issued what came to be known as 'freak cheques', combining advertisement with the ordinary features of a cheque, importing unusual terms as to receipt or presentation, which left the banker in doubt whether it was a cheque or not, and so forth. In the earlier editions of this book the view has been expressed that bankers would be justified in refusing to pay in extreme cases of this sort, moulding the reply in terms calculated to safeguard the customer's credit; but in the absence of definite legal sanction for such a course the position was a difficult one.

But now judgments both in the *Macmillan* and the *Joachimson Cases* explicitly declare that it is part of the contractual relation that the customer shall issue and the banker receive his mandate, embodied in the cheque, in plain, unmistakable terms.

In the *Macmillan Case* LORD HALDANE said :

"The customer contracts reciprocally that in drawing his cheques he will draw them in such a form as will enable the banker to fulfil his obligations, and therefore in a form which is clear and free from ambiguity."

The banker's position under the contract he defines as follows :

"The banker, as a mandatory, has a right to insist on having his mandate in a form which does not leave room for misgiving as to what he is called upon to do."

And LORD SHAW enunciates much the same rule with regard to a cheque which suggests having been tampered with.

The summary in the *Joachimson Case* by ATKIN, L.J., of the mutual rights and responsibilities of the parties, hereinbefore set out, includes a statement to the like effect.

It was recognised in the *Macmillan Case* that failure on the customer's part to comply with his obligation in this respect absolved the banker from his to pay the cheque. The duties being correlative, the banker's does not arise until and unless the customer fulfils his, he, as mandant or principal, being the party with whom inception rests. Another principle, recognised in the *Macmillan Case*, which would justify the banker in his refusal, is that the customer has no right to put upon the banker, and the banker is not bound to undertake, any risk or liability not contemplated in or essentially arising out of the ordinary routine of business.

It may be noted that in *Macmillan's Case* two of the Law Lords assumed or suggested that the banker's answer on a cheque refused payment on the ground of irregularity would or should be 'Refer to drawer'. This is not quite consonant with banking practice or feeling. 'Refer to drawer' is a far milder form of refusal than N/A or N/S, and does not

necessarily reflect on the drawer's financial position (b). But the usual answer of the banker in such cases would be 'Cheque irregular, requires confirmation', which is quite innocuous and fully answers the purpose.

If the banker elects to pay on an ambiguous mandate and does so on a reasonable misinterpretation of its meaning, he may set up that the misleading him by the customer disentitled the customer to complain, being a breach of the customer's contractual duty; or rely on the recognised rule that an agent cannot be made liable who has adopted a reasonable course in face of ambiguity in the principal's instructions, whether such ambiguity arise from the method of expression or the medium of communication (c).

Where any particular form of irregular cheque has been paid without objection for an appreciable period, it would not be open to the banker to return any such without previous warning to the customer. A course of business has arisen which the customer is entitled to assume will continue until he receives due notice of termination.

Unusual risks

It may be confidently asserted that the right of the banker to decline unusual risks, now clearly recognised, is not confined to those arising directly from ambiguity of the mandate due to the customer, whether in his framing or transmitting it. It is a fair reading of the contractual obligation that not only shall the customer not impose, but the banker shall or need not undertake, exceptional risks. There are contingencies arising in banking practice, say with regard to indorsements, where, in the interests of banker and customer alike, the only reasonable course is that usually adopted, namely, to 'postpone' payment pending inquiries or pending confirmation, stating the reason for refusing payment in appropriate and innocuous terms. Take the case of a cheque or draft negotiated abroad, on which appears a special indorsement in Arabic or other Oriental characters, conveying absolutely nothing to the ordinary Englishman. In *Carlisle and Cumberland Banking Co. v. Bragg* (d) BUCKLEY, L.J., referring to a document in Oriental characters, said that with regard to it he was in the position of a blind man. Is the banker to pay it without inquiry or verification, relying on the protection of s. 60 (e), when 'good faith' has no intelligent basis, the characters hardly 'purport' anything to one to whom they convey no meaning, and the 'ordinary course of business' would surely suggest verification?

(b) See *Flach v. London and South-Western Bank, Ltd.* (1915), 31 T.L.R. 334; 3 Digest 220, 567.

(c) *Ireland v. Livingston* (1872), L.R. 5 H.L. 395; 1 Digest 428, 1206; *Currie v. London City and Midland Bank, Ltd.*, [1908] 1 K.B. 293; 3 Digest 224, 589.

(d) [1911] 1 K.B. 489; 17 Digest 235, 501. (e) 2 Halsbury's Statutes 66.

By issuing such cheque, or in fact any cheque, the customer must surely be taken to empower the banker to act reasonably for his own protection in any contingency which may arise in connection with the cheque which he issues as his mandate.

It is true that the *dictum* of MAULE, J., in *Robarts v. Tucker* (f), that a banker might defer payment of a bill until he had satisfied himself that the indorsements thereon were genuine, was expressly disapproved by the House of Lords in *Vagliano's Case*, LORD MACNAGHTEN laying down that a banker must pay off-hand, and as a matter of course, bills presented for payment, duly accepted and regular and complete on the face of them; and as a general rule this doctrine would appear to apply with equal force to cheques presented for payment.

But it should be noted that the House of Lords' ruling only applies to bills regular and complete on the face of them. This must be taken to include indorsements. So long as the indorsements are apparently in order, and regular in form, it may well be that, whether it be bill or cheque, the banker is not entitled to time to investigate their genuineness. In the case of cheques he does not need it, being protected by s. 60. But when there is an abnormal feature, an inconsistency, an apparent irregularity, whether on the face of the cheque or bill or in the evidences of its negotiation, the banker is confronted with a difficult situation into which he has been drawn by the customer, who, in issuing the cheque or accepting the bill payable at his banker's, must be taken to have contemplated the vicissitudes and possibilities of negotiation, and the banker is entitled to take a reasonable course for his own protection. Such precaution would generally be in the customer's interest as well, but the banker might not be in a position to set this up in his own justification.

Only responsible to customer

Of course, on whatever ground a cheque is refused payment, the banker is only responsible to his customer, unless he has marked the cheque or given some equivalent personal undertaking to the holder. A cheque is not, in England, an assignment of funds (g), and the holder has no claim of any sort on it against the banker on whom it is drawn.

No payment of part

It is to this principle of a cheque not being an assignment of funds that is generally attributed the undoubted fact that in England a banker is not bound to pay part of a cheque when he has in hand funds, but not sufficient to pay the whole amount.

It is somewhat difficult to see how, in any event, the assignment of one specific sum or debt could operate as an assignment

(f) (1851), 16 Q.B. 560; 3 Digest 228, 614.

(g) Bills of Exchange Act, 1882, s. 53; 2 Halsbury's Statutes 63.

of any lesser sum or debt which happens to be due. It is probably more correct to base the banker's right altogether to refuse payment on the fact that his only contract with, or duty to, the customer is to pay a cheque when he has the equivalent or a larger sum in hand, as laid down by ATKIN, L.J., in the *Joachimson Case*, and that part payment is not included in or contemplated by such contract or duty. Part of the amount of a cheque is obviously not 'sufficient funds to meet it' (h).

It has been asked whether the holder of a cheque larger in amount than the available funds is entitled to pay in the difference to the customer's account and then withdraw the whole on the cheque. It is clear that the banker must not facilitate the operation by informing the holder how much the account is short of the amount of the cheque. That would be unjustifiable disclosure of the customer's affairs, and, if followed by receipt of the difference and payment of the cheque, might constitute a fraud on other creditors of the customer (j).

The Institute of Bankers have expressed the opinion that where there is no disclosure, the balance should be received and the cheque paid (k). The only criticism on this seems to be that if the customer subsequently became bankrupt, the trustee might want to know why the banker had abrogated in the holder's favour the usual rule by which moneys paid in, even in notes or gold, are not available for drawing against, until such period has elapsed as is necessary to enable the bank to carry out the requisite book-keeping operations (l). And no doubt it would be open to the banker to decline to pay the cheque on this ground, if he wished not to pay it. And such refusal would not interfere with his crediting his customer with the amount paid in. Where a cheque is refused payment with a request to present again, it lies entirely with the holder whether he will do so or at once treat the cheque as dishonoured (m).

A banker cannot discharge his obligations to the customer by referring outstanding cheques to another bank, except by arrangement with the customer. A holder can treat a cheque as dishonoured if not paid on presentation at the bank on which it is drawn, and is not bound to go elsewhere for the money.

The rules of the Clearing House require that a bank dishonouring a cheque presented through the Metropolitan or Country clearing shall return the cheque by first post to the

(h) *Carew v. Duckworth* (1869), L.R. 4 Exch. 313; 3 Digest 223, 584.

(j) *Foster v. Bank of London* (1862), 3 F. & F. 214; 3 Digest 305, 986; *Hardy v. Veasey* (1868), L.R. 3 Exch. 107; 3 Digest 304, 985.

(k) *Questions on Banking Practice*, 8th ed. (1930), Question 495.

(l) See *Marzetti v. Williams* (1830), 1 B. & Ad. 415; 3 Digest 217, 549.

(m) Cf. *Sednaoul Zariffa Nahas & Co. v. Anglo-Austrian Bank* (1909), "Journal of Institute of Bankers", vol. xxx, p. 413; Times, April 26, 1909; 3 Digest 221, 371.

branch or office into which it was paid. It must be returned direct, not through the London office. Where these rules apply, a bank neglecting to adopt this course will be held to have undertaken to pay the cheque (n).

Cheques should as far as possible be paid in the order in which they are presented, if there be any question as to the sufficiency of the balance to cover them all (o).

The fact that one cheque has been refused on the ground that it overtops the available balance would not justify the banker in refusing payment of a cheque subsequently presented for an amount within the balance.

Cheques simultaneously presented

The question has arisen as to what should be done when two or more cheques are presented simultaneously by the same post or through the clearing and the balance is sufficient to satisfy one or some but not all.

Where there is only one of the lot within the limit, clearly that one should be paid. But if there are two, each within the limit, but not enough money to pay both, or if there is enough money to pay two small ones but not one large one, if the small ones are paid, the banker's position is more difficult. On the one hand it is contended that if the banker pays any but not all, he is unduly favouring some of the customer's creditors; on the other hand it is said that he is bound to protect his customer's credit as far as possible, and that he is not doing so if he refuses to pay such of the cheques as the account will stand. In one instance, referred to on page 248 of the "Journal of the Institute of Bankers" for April 1914, a bank adopted the former course and dishonoured all the cheques, and apparently no legal proceedings followed. The better opinion seems to be, however, that the banker should pay as far as possible. The proposition put to the Council of the Institute (oo) was of a customer with a credit balance of £10 on his current account. Two cheques are presented the same day in the Country clearing, each for £7. The question was asked should the banker return both cheques or only one; if he is bound to pay one cheque, how is the selection to be made? And the answer was, "One cheque should be paid, but no ruling can be given where the amounts are equal. When the amounts are not equal, it is customary to pay the larger cheque if there are sufficient funds." In similar circumstances the preference of the larger cheque is probably justified by the fact that if the smaller were paid, there would still be a, or a larger, balance left. On the other hand, it is to be borne in mind that

(n) *Parr's Bank, Ltd. v. Ashby (Thomas) & Co.* (1898), 14 T.L.R. 563; 3 Digest 223, 583.

(o) See *Sednaoui Zariffa Nahas & Co. v. Anglo-Austrian Bank*, *ubi supra*.

(oo) *Questions on Banking Practice*, 8th ed. (1930), Question 417.

the smaller the amount of any cheque which is dishonoured, the greater the possible damage to the drawer's credit.

But the banker is clearly not entitled to dishonour cheques presented because he knows of others to be presented shortly, unless he has special instructions from the customer to do so (p).

Cheques out of date

It is the custom of bankers not to pay cheques which are presented after a certain period has elapsed since their ostensible dates of issue. The period varies ; with some banks it is six months, with others twelve.

The justification for this course is not very obvious. The difference, above alluded to, between the practice of various banks makes it difficult to set up a custom of bankers. Such a custom must be universal and uniform among, at least, the bankers of a particular locality ; there cannot, for instance, be one custom of bankers in the City and another in the West End (q). "It was either a custom of the trade or nothing" (r). Nor does the custom of a particular bank bind even a customer until it develops into a course of business. Such custom is referred to in a note to *Serle v. Norton* (s) ; but the note is, of course, of no authority and the case itself affords none, especially in the altered conditions of the Bills of Exchange Act. The practice may owe its origin to the erroneous impression that the drawer of a cheque is discharged from liability if it is not presented within a reasonable time after issue. The Bills of Exchange Act is certainly not explicit on the point ; but, as hereinbefore explained (t), the drawer's liability holds good for six years, save in one contingency, that of the cheque not having been presented within reasonable time, the bank having failed within such reasonable time, and the drawer having lost money by reason of such failure and non-presentation, in which case he is discharged to the extent of his loss and no further. The banker naturally knows he has not failed in the interval between the date of the cheque and its presentment for payment, and would presumably be justified in paying it at any time within six years. No doubt cheques are intended for speedy presentation, not prolonged negotiation or as continuing security ; but that has no legitimate application beyond that of limiting the period a cheque may be held over to charge parties other than the drawer, the cheque differing herein from the ordinary bill on demand. A man who takes a cheque either direct from the drawer or by subsequent negotiation is perfectly entitled to hold it for any time short of six years

(p) *Sedmaoui Zarifla Nahas & Co. v. Anglo-Austrian Bank* (1909), "Journal of Institute of Bankers", vol. xxx, p. 413 ; Times, April 26, 1909 ; 3 Digest 221, 571.

(q) Cf. *Rickford v. Ridge* (1810), 2 Camp. 537 ; 3 Digest 201, 457, and *Lloyds Bank, Ltd. v. Swiss Bankverein* (1913), 108 L.T. 143 ; 3 Digest 276, 861.

(r) *Ibid.* per FARWELL, L.J., at p. 145.

(s) (1841), 2 Mood. & R., at p. 404.

(t) p. 110, ante.

from issue, and then present it, and, if not paid, sue the drawer unless the bank has failed meantime; his only loss of remedy is that against indorsees if he has not presented within reasonable time of such indorsement.

In the case of order cheques, the banker might possibly justify refusal on the ground that the practice has become so general that payment after the allotted period would not be in the ordinary course of business, but here again the varying length of that period offers difficulties.

The answer given on such cheques, such as 'Out of date', is, however, in no wise calculated to damage the customer's credit, and the question of the validity of the practice is, therefore, never likely to be raised.

Bankers generally call such cheques 'stale', a term more properly applied to a cheque which is negotiated after being, on the face of it, an unreasonable time in circulation and so is assimilated to an overdue bill by s. 36 (3) (u). As to when a cheque becomes stale or overdue see *London and County Banking Co. v. Groome* (w). In the absence of special circumstances ten days or so would probably be held the limit.

The disputed question of the payment of cheques to a man known to be an undischarged bankrupt has already been dealt with.

The bearing of the Bankruptcy Act, 1914, on the right of the banker to pay cheques under various conditions affecting the customer is treated under the heading of 'The Current Account'.

A. FUNDS MUST BE SUFFICIENT AND AVAILABLE

The obligation of the banker to pay cheques drawn on him by his customer is subject to the condition that there are in his hands funds of that customer sufficient and available for the purpose (y).

B. THE FUNDS MUST BE SUFFICIENT

As before stated, there is in England no obligation to pay part of a cheque, and such a proceeding would be unwise. The question of cheques simultaneously presented when there is enough money to pay some but not all has already been dealt with (z).

The right of a bank to combine separate accounts, whether at the same or different branches, involves the result that the sufficient funds to meet cheques must be calculated by deduct-

(u) 2 Halsbury's Statutes 52.

(w) (1881), 8 Q.B.D. 288; 3 Digest 203, 471.

(y) See per PARKE, J., in *Whitaker v. Bank of England* (1835), 1 Cr. M. & R., at pp. 749, 750; 3 Digest 226, 595; *Mazetti v. Williams* (1830), 1 B. & Ad. 415; 3 Digest 217, 549, and the summary by ATKIN, L.J., in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K.B. 110; 21 Digest 639, 2188.

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(z) *Ante*, p. 179.

ing debit balances from credit balances all round, unless, by agreement or course of business, such accounts have to be kept separate, or they are kept in different rights or characters (*a*). The customer has no corresponding right to combine, and can only draw on the branch at which he has a sufficient credit balance irrespective of any credit balance he may have elsewhere (*b*).

C. THE FUNDS MUST BE AVAILABLE FOR THE PURPOSE

As shown hereinbefore under the heading of 'Current Account', the old theory that money cannot be followed into the banker's hands, that once it has assumed the form of a debt from the banker to the customer it becomes for all and every purpose a debt and nothing more, and that the banker is estopped from disputing the right of his customer to draw upon it, has undergone considerable modification by recent decisions. But it remains true that the banker cannot, of his own motion, set up the claims of third parties or dispute his customer's title to money he has received from him or for his account. Unless and until restrained by legal process, the banker must recognise the person from or for whom he received the money as the proper person to draw on it, and the money as available for that purpose (*c*).

When money is available

Money is not available immediately it is paid in. Even in the case of notes or gold, a sufficient period must be allowed to elapse, before drawing against it, to enable the bank to carry out the necessary book-keeping operations (*d*). But as soon as it is definitely credited, it is available (*e*).

When cheques available

With regard to cheques, the rule has always been that they were not available until, in addition to the interval reasonably required for book-keeping entries, the necessary period had elapsed for the cheques to be cleared, according to whether they were town or country.

(a) *Garnett v. McKewan* (1872), L.R. 8 Exch. 10; 3 Digest 222, 574; *Buckingham & Co. v. London and Midland Bank, Ltd.* (1895), 12 T.L.R. 70; 3 Digest 218, 554.

(b) *Woodland v. Fear* (1857), 7 E. & B. 519; 3 Digest 217, 548; *Garnett v. McKewan* (1872), L.R. 8 Exch. 10; 3 Digest 222, 574, and the summary by ATKIN, L.J., in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K.B. 110; 21 Digest 639, 2188; *McNaghten v. Cox & Co.* (1921), Times, May 11th.

(c) *Calland v. Loyd* (1840), 6 M. & W. 26; 3 Digest 190, 389; *Tassell v. Cooper* (1850), 9 C.B. 509; 3 Digest 188, 378; *Szek v. Lloyds Bank* (1908), Times, January 15th; 3 Digest 217, 553.

(d) *Marzetti v. Williams* (1830), 1 B. & Ad. 415; 3 Digest 217, 549; *Griffiths v. London County and Westminster Bank, coram LAWRENCE, J.*, May 10, 1912.

(e) See the *Gordon Case*, [1903] A.C. per LORD LINDLEY, at p. 249; *Re Mills, Bawtree & Co., Ex parte Stannard* (1893), 10 Morr. 193; 3 Digest 218, 556.

Where the practice of entering cheques as such, and of distinguishing between town and country cheques, is maintained, or where the customer is notified, by memorandum in his pass book or paying-in slip, that cheques will not be available until cleared or until the expiration of fixed periods, the rule holds good; and, in the absence of any course of business entitling a particular customer to draw against uncleared cheques, cheques so drawn might be returned with the answer 'Effects not cleared'.

Credited as cash

Where the cheques have at once been credited as cash, and there are no counteracting stipulations affecting the customer, the right to return cheques on the ground that the assets have not been cleared depends on the vexed question whether, under the *Gordon Case*, the banker has put himself in the position of holder for value by so crediting the cheques. In that case (f) LORD LINDLEY says:

"It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right."

It is clear from the context and the whole tenour of the judgment that this *dictum* includes the crediting of cheques as cash, to which, indeed, it was primarily directed. *Jones & Co. v. Coventry* (g) is the only case in which this principle has been recognised as between banker and customer. The majority of cases have been by true owner against collecting banker, as in the *Gordon Case*, and either by reason of the cheque not having been crossed or by the protection of s. 82 (h) having been lost by negligence, the bank has sought to put itself in the position of holder for value, having taken the cheque in good faith, though possibly negligently. The decisions are conflicting and the matter complicated by the Bills of Exchange (Crossed Cheques) Act, 1906. The question can only be set at rest by some ultimate decision of the House of Lords, and the position of the collecting banker to his customer, where the former has credited cheques as cash before clearing, must necessarily stand or fall by the test of whether he is a holder for value or an agent for collection of those cheques.

The matter seems therefore one more fitly to be dealt with under the heading of 'The Collecting Banker', treated hereafter (Chapter 17).

If so credited in the pass book which is delivered to the customer there can, of course, be no question that the amount

(f) [1903] A.C. 240, at p. 249; 3 Digest 240, 676.

(g) [1909] 2 K.B. 1029; 3 Digest 177, 320.

(h) 2 Halsbury's Statutes 76.

can be drawn against (j). In *Holland v. Manchester and Liverpool District Banking Co., Ltd.* (k) LORD ALVERSTONE, C.J., suggested that in case of mistake the account might be corrected after the amount had been drawn, but awarded damages for the dishonour of cheques before correction. The former of these propositions may be true where there has been no alteration of the customer's position in reliance on the entry (l), but is certainly wrong where there has been any such alteration of position. In *British and North European Bank, Ltd. v. Zalstein* (m) it was held that a fictitious entry in the pass book, fraudulently made by an officer of the bank, cannot be relied on where the customer has neither received notice thereof nor acted thereon so as to alter his position—an obvious and reasonable decision. Cf. 'The Pass Book', *post*, p. 344.

Retaining balance to meet bills discounted

Save in the event of the customer's bankruptcy, the banker is not entitled to retain money standing to current account to meet contingent liabilities of the customer to him.

In *Bolland v. Bygrave* (n) ABBOTT, L.C.J., sitting at *Nisi Prius*, appears to have thought the banker's lien attached to securities of the customer when the banker had discounted bills for, or accepted bills for the accommodation of, the customer. He says :

"It appears that, at this time, the bankrupts had discounted bills for T. to a large amount, which were still unpaid ; that they had also accepted a bill for his accommodation to a large amount, not then due ; and I think that a banker who stands in this relation to a customer has a lien upon any securities of that customer which may for any purpose be placed in his hands, and he has a right to retain them to countervail the liabilities he has so incurred on his behalf till those liabilities have ceased."

As the banker's lien extends to money (o), this has been cited as an authority that bankers are entitled to retain moneys to meet liabilities of this sort, and treat such moneys as not available for drawing against.

Bolland v. Bygrave (n) was again quoted in argument in the

(j) *Akrokers (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K.B. 465 ; 3 Digest 240, 677 ; *Bevan v. National Bank, Ltd.* (1906), 23 T.L.R. 65 ; 3 Digest 240, 678 ; cf. *Holt v. Markham*, [1923] 1 K.B. 504 ; 21 Digest 305, 1111.

(k) (1909), 25 T.L.R. 386 ; 3 Digest 222, 576.

(l) Cf. *Commercial Bank of Scotland v. Rhind* (1860), 3 Macq. 643, H.L. ; 3 Digest 247, 720.

(m) [1927] 2 K.B. 92 ; Digest Supp.

(n) (1823), Ry. & M., 271, N.P. ; 3 Digest 285, 879. This case was quoted to the Exchequer Chamber in *Barnett v. Brandao* (1843), 6 Man. & G., at p. 654, when LORD DENMAN, C.J., said of it : "Some of the cases arising out of Marsh's bankruptcy (of which it was one) are not correctly reported" and PARKER, B., said : "The whole of that case depends upon what is meant by depositing for safe custody."

(o) *Misa v. Currie* (1876), 1 App. Cas., at p. 569 ; 3 Digest 291, 906.

same case in the House of Lords (*q*), but no special remark made upon it.

In *Agra and Masterman's Bank, Ltd. v. Hoffmann* (*r*) STUART, V.-C., granted an injunction restraining a customer from suing his bankers at law for damages for dishonouring his cheques, the bank contending that they had rightly retained the funds to answer the liability which might fall on them in respect of bills discounted by them for the customer, but not yet due. The injunction was granted mainly on the ground that there was a question to be tried in equity, and is not conclusive of the right; moreover, as appears from a footnote, the matter was subsequently compromised on terms which included the payment by the bank of the customer's costs of the action at law and the suit in equity, as between solicitor and client, which is, at least, significant.

In *Jeffryes v. Agra and Masterman's Bank* (*s*) the last-mentioned case was cited to SIR W. PAGE WOOD, V.-C. In his judgment he said:

"The bankers say, further, that there were very heavy liabilities outstanding, and that they would have retained, when they became due, these balances as against those outstanding bills. I apprehend they never could do that in any court of law, and of course there is no equity of the kind; you cannot retain a sum of money which is actually due against a sum of money which is only becoming due at a future time."

The matter was, however, set at rest in 1874 by the case of *Bower v. Foreign and Colonial Gas Co., Ltd., Metropolitan Bank, Garnishees* (*t*). There the customer had a credit balance on current account of £751. The bank had discounted bills for him, not yet due, for £500. A garnishee order having been served on the bank, based on a judgment against the customer, the bank claimed to retain £500 of the current account against the liability on the bills, alleging that they had a lien to that extent.

The Court held that they had not. LORD COLERIDGE, C.J., said that here there was a cash balance; and the fact that the bankers had discounted bills for their customer which were still running was no ground for an implied agreement for a lien on the balance; indeed, it would be contrary to the object of such advances. BRETT, J., said that there was no evidence of custom or anything from which the Court could imply an agreement. It would be quite contrary to the regular course of such advances to adopt the view of the bank. A customer asks for discount in order to increase his drawing account. It was said the bank had a lien on the cash balance. If that was the case, there would be no use in discounting the bills.

(*q*) (1846), 12 Cl. & Fin., at p. 798; 3 Digest 290, 902.

(*r*) (1864), 5 New Rep. 214; 3 Digest 220, 568.

(*s*) (1866), L.R. 2 Eq. 674; 3 Digest 294, 923.

(*t*) (1874), 22 W.R. 740; 3 Digest 285, 882.

GROVE, J., said there was a great difference between the case of securities, as in the authorities cited (which included *Bolland v. Bygrave*), and a drawing account. A later decision to a similar effect is *Baker v. Lloyds Bank, Ltd.* (u).

It may therefore be taken as conclusively settled that the fact of a banker's having discounted for a customer bills still maturing gives him no right to retain any of the current account to answer the contingent liability on those bills and, on that ground, dishonour cheques drawn against such current account.

Where customer is bankrupt

It is different where the customer becomes bankrupt.

The liability of an indorser on a current bill, although contingent, is a provable debt in his bankruptcy (w), and any provable debt may be utilised for set-off as a mutual dealing or credit under s. 31 of the Bankruptcy Act, 1914 (y). The holder is not obliged to value his security, except for purposes of voting under the second schedule to that Act. The liability is sufficient to establish a mutual dealing or credit; and the banker would, on bankruptcy of the customer, be entitled to retain the whole or a portion of the current account equivalent to the amount of the bill. But the result is by virtue of bankruptcy law, not of lien (z).

D. TO BE AVAILABLE THE MONEY MUST BE UNENCUMBERED AND DUE TO THE CUSTOMER

Service of a garnishee order *nisi*, founded on a judgment against the customer, ties up the whole credit balance on current account, irrespective of the relative amounts of the judgment and the balance (a), except where the order is worded so as to require the attachment of a limited sum, as is often the case nowadays. The effect is the same despite the decision in the *Joachimson Case* that the credit balance is not due from the banker until actual demand. The judgments in that case expressly specify that the remedy by garnishee process remains the same as before, though, as previously stated, the position appears somewhat illogical and inconsistent with previous authority.

That judgment further decides that, as moneys in the banker's hands to a customer's credit do not constitute a debt due and payable until demand, the Limitation Act does not run in favour of the banker until such demand has been made.

(u) [1920] 2 K.B. 322; Digest Supp.

(w) Bankruptcy Act, 1914, s. 30; 1 Halsbury's Statutes 636.

(y) 1 Halsbury's Statutes 637.

(z) Cf. *Alsager v. Currie* (1844), 12 M. & W. 751; 3 Digest 294, 921; *Baker v. Lloyds Bank, Ltd.*, [1920] 2 K.B. 322; Digest Supp.

(a) *Rogers v. Whireley*, [1892] A.C. 118; 3 Digest 176, 317.

A credit account which has been absolutely dormant for six years is therefore available for drawing purposes or for attachment by garnishee process.

The banker's lien, where applicable, would probably entitle him to treat funds liable thereto as not available.

The banker would be entitled to retain funds to meet a cheque he had marked at the instance of his customer and treat such funds as not available for other drawing purposes.

SECTION 4.—ANSWERS ON CHEQUES REFUSED PAYMENT

In every case where a cheque is refused payment, the answer thereon should, so far as consistent with truth, be framed in the form least calculated to damage the customer's credit.

There is probably no right in the ordinary holder to require a written or any answer. Where presented through the London Clearing House, the rules of that establishment require a written answer to be given.

The answer on the cheque does not appear to be a legitimate element in the action for dishonour of the cheque, that being a pure action for breach of contract, to which the answer is not strictly relevant. The two claims, however, can be and sometimes are combined in one action, the claim as to the answer being framed in libel. They should be presented separately to a jury, though this rule has not always been observed. In *Szek v. Lloyds Bank (b)* the claim was for dishonouring four cheques and also for libel in writing 'Refer to drawer' on such cheques. GRANTHAM, J., told the jury that if they thought it a case for damages they would probably be disposed to award one sum which would cover the two claims for breach of contract and libel. The jury, however, did not do so, but awarded £250 damages for breach of contract and nothing on the claim for libel.

Of course there are many answers which cannot possibly be libellous or in any way hurt the customer's reputation, such as are based on some irregularity in the form of the cheque or in the indorsements, e. g., 'Requires confirmation', 'Words and figures differ', 'Indorsement irregular', and so on.

'Refer to drawer' would seem by itself not to be libellous, though, as above stated, GRANTHAM, J., left it to the jury in *Szek v. Lloyds Bank*. SCRUTTON, J., in *Flach v. London and South-Western Bank, Ltd. (c)*, said that in his opinion the expression amounted to a statement of the bank, "we are not paying; go back to the drawer and ask him to pay". In the view he took of the case, the bank were justified

(b) (1908), Times, January 15th; 3 Digest 220, 566.

(c) (1915), 31 T.L.R. 334, at p. 336; 3 Digest 220, 567.

in not paying under the moratorium, and he did not think that it was possible to extract a libellous meaning from what had been said by the bank. This statement was adopted by DU PARCQ, J., in *Plunkett v. Barclays Bank, Ltd.* (d).

'N/S.' brought no damages in *Cox v. Cox & Co.* (e), though it is a somewhat significant answer. In *Davidson v. Barclays Bank, Ltd.* (ee), HILBERY, J., held that the words 'not sufficient' on a bookmaker's cheque were libellous, there being sufficient on his account to meet the cheque. The bank had paid a cheque which the bookmaker had stopped, hence the second mistake. The bank pleaded qualified privilege, which defence failed, as they could not, by their own mistake, create a duty on their part to make a communication for which there was no need. The answer 'N/A', where not justified, would be far more serious, because it might fairly be construed as implying that the drawer was intentionally passing cheques on a bank where he had no account, and therefore no expectation of their being met—a criminal offence (f).

There does not seem to have been any very definite legal decision on any of these particular forms; most of the cases are of first instance, where learned judges may take somewhat individual views. The general rule seems to be that laid down by the Court of Appeal in *Frost v. London Joint Stock Bank, Ltd.* (g). There a cheque was returned unpaid to the holder by the defendant bank, which had presented it for him, with a slip attached by them bearing the words, 'Reason assigned', and against these was written 'Not stated'. The drawer sued the bank for libel. Evidence was given that business men would interpret the slip as meaning that the cheque had been dishonoured for want of funds to meet it. The plaintiff recovered £50 for libel. The Court of Appeal reversed this decision and entered judgment for the bank.

In general terms they laid down that where words are not obviously and directly defamatory, the test is not what they might convey to a particular class of persons who, by reason of their calling, might attach a special significance thereto, but what they would ordinarily suggest to the mind of every person of average intelligence who read them. It may well be that some of the answers in daily use may have acquired special meanings or significance to business men, but it is deducible from this case that such mere technical construction is not sufficient to put a forced interpretation on words not in themselves defamatory.

In *Millward v. Lloyds Bank, Ltd.* (gg), WRIGHT, J., thought it

(d) [1936] 2 K.B. 107; [1936] 1 All E.R. 653; Digest Supp.

(e) (1921), Times, March 18th.

(ee) [1940] 1 All E.R. 316; 2nd Digest Supp.

(f) *Smith v. Cox & Co.* (1923), Times, March 9th.

(g) (1906), 22 T.L.R. 760; 3 Digest 220, 565.

(gg) (1920), unreported.

defamatory of a merchant to return a bill drawn by him to the payee marked 'R/A'. The point was not decided in *Allen v. London County and Westminster Bank, Ltd.* (h), but COLLINGE, J., said that it was immaterial whether the plaintiff claimed to recover damages for breach of contract or for libel or for both, as in any event the damages would be identical.

An indorsee might possibly be libelled by the answer on a cheque.

To a question put to the Institute of Bankers whether a bank could return a cheque with the answer 'Indorsement forged', where they knew this to be the case, the Council, while saying that the bank would be justified in so doing, said, "but the more judicious answer would be 'Indorsement requires verification'."

SECTION 5.—DETERMINATION OF AUTHORITY TO PAY CHEQUES

Bills of Exchange Act, 1882, s. 75 (i), enacts :

"The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by, (1) countermand of payment, (2) notice of the customer's death."

Stopping cheques

To constitute an effective countermand it must come to the conscious knowledge of the banker, constructive countermand being unknown in mercantile matters (j). If it be by the negligence or default of the bank that such countermand fails to be effective, the bank will be liable to the customer for any loss incurred thereby (k).

An unauthenticated telegram purporting to come from the customer, stopping a cheque, is not sufficient to justify the banker in so serious a step as absolutely refusing payment. His proper course is to return the cheque with an answer indicating the state of affairs and cause, so as not to damage the customer's credit, and requesting re-presentation, and communicate with the customer asking for confirmation. Presumably the same course should be adopted when a cheque is stopped by telephone, unless the banker can satisfy himself that the person communicating with him is really the customer. A stop to one branch of a bank is not an effective stop on a cheque drawn on another branch of the same bank (l). As to the position where the stop gives the

(h) (1915), 84 L.J.K.B. 1286; 3 Digest 264, 810.

(i) 2 Halsbury's Statutes 73.

(j) *Curlice v. London City and Midland Bank, Ltd.*, [1908] 1 K.B. 293; 3 Digest 224, 589.

(k) *Ibid.*; *Reade v. Royal Bank of Ireland, Ltd.*, [1922] 2 L.R. 22; Digest Supp.; cf. *Westminster Bank, Ltd. v. Hilton* (1926), 136 L.T. 315; Digest Supp.

(l) *London Provincial and South-Western Bank, Ltd. v. Buszard* (1918), 35 T.L.R. 142; 3 Digest 173, 303.

wrong number of the cheque and for an authoritative review of the whole matter, see *Westminster Bank, Ltd. v. Hilton (m)*.

Notice of countermand is, of course, ineffective if the cheque to which it relates is paid at the time the drawee banker receives the notice. Where, therefore, a cheque is presented over the counter and is paid there can be no effective countermand, even if the cheque is crossed. The drawer's remedy against the banker is in damages for breach of contract. The drawer's right to countermand endures up to the time the instrument is paid or to that when the banker has either to pay or dishonour, whichever is the earlier. Where, then, the drawer and the payee bank at the same branch of the drawee bank and the cheque is crossed, the banker is entitled to hold it over until the close of business before paying or returning it, and during that time the drawer may countermand and neither a request for payment made by the payee nor his wish to know if he may regard the cheque as paid takes away the drawer's right.

One of several partners (*n*), trustees, or executors has power to stop a cheque given by any or all of the body. A banker paying a cheque after it has been effectively countermanded is liable to his customer for the amount (*o*), and may be unable to debit the drawer's account.

Death of customer

In the case of the customer's death, no specific form of notice is provided for, and there does not seem any authority on the point. Mere rumour would not be sufficient for the banker to act upon, but he could not safely disregard any fairly reliable information, such, for instance, as an announcement in a responsible newspaper. Although the property passes to the legal representatives on the death itself, the banker is justified as against them in payment made on cheques after the death but before notice thereof (*p*).

As to the practical supersession of the customer's authority to draw cheques, and of the banker's obligation to pay them by circumstances indicating impending or possible bankruptcy on the part of the customer, see *ante*, 'Current Account', p. 43.

Insanity

If the customer become absolutely insane, the banker should not honour his cheques (*q*). Since the Lunacy Act, 1890, the

(*m*) (1926), 136 LT. 315; Digest Supp.

(*n*) *Gaunt v. Taylor* (1843), 2 Hare, 413; 3 Digest 176, 315.

(*o*) *Twilbell v. London Suburban Bank*, [1869] W.N. 127; 3 Digest 187, 375.

(*p*) Cf. *Tate v. Hilbert* (1793), 2 Ves. 111; 25 Digest 547, 321.

(*q*) *Drew v. Nunn* (1879), 4 Q.B.D. 661; 33 Digest 129, 53; cf. *Daily Telegraph Newspaper Co. v. McLaughlin*, [1904] A.C. 776; 33 Digest 135, 124; cf. *Bradford Old Bank v. Sutcliffe* (1918), 34 T.L.R. 299; affirmed on appeal, but this matter not dealt with, [1918] 2 K.B. 833; 12 Digest 489, 3997.

fact that a man is confined as a lunatic is pretty conclusive evidence of his insanity, as he cannot be detained without judicial or official authority for more than seven days, and even for that time only under special circumstances. But see the Mental Treatment Act, 1930 (*r*), for voluntary submission to treatment in an institution for mental illness.

Winding-up

Where a joint stock company is wound up, either compulsorily or voluntarily, cheques drawn by directors subsequently to the commencement of the winding-up are not the cheques of the company (*s*). It is conceived, however, that the banker would be held justified in paying them until notice of the winding-up had reached, or could be imputed to, him.

(*r*) 23 Halsbury's Statutes 154.

(*s*) *Re London and Mediterranean Bank, Bolognesi's Case* (1870), 5 Ch. App. 567; 3 Digest 146, 164.

CHAPTER 11

PAYING BEARER CHEQUES

Bearer bills

The Bills of Exchange Act, s. 8, sub-s. 3 (a), enacts that

“A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.”

As to bills being payable to bearer when the payee is a fictitious or non-existing person, see *ante*, p. 120. The question is not very material to the paying banker, by reason of his being protected against forged indorsements of order cheques. Either the cheque would be payable to bearer as being payable to a fictitious or non-existent person, or if the circumstances deprived it of this character, the indorsement, if not genuine, would be a forgery. Both defences might in fact be set up in the former case, as it is a forgery to counterfeit the name of a non-existent fictitious person.

By s. 2 (b), ‘Bearer’ is defined as “the person in possession of a bill or note which is payable to bearer”, and ‘Holder’ includes the bearer of a bill or note.

Discharge

Section 59 (c) provides that a bill is discharged by payment in due course by or on behalf of the drawee or acceptor, and defines payment in due course as payment made at or after the maturity of the bill to the holder thereof, in good faith and without notice that his title to the bill is defective.

It is somewhat curious that these last words do not specifically include the case of no title, as well as defective title, in the holder, as, for instance, is the wording in s. 82 (d). Possibly they are unnecessary; notice that a man had no title would include notice of a defective title, on the principle of the greater including the less; whereas there is good reason for specifying both in s. 82. The case cited by Sir Mackenzie Chalmers (*dd*), as authority that payment of a stolen bearer bill to the thief is a good discharge (e), is not a satisfactory one, the case being nowhere reported, the facts being that the bill was lost, not stolen, and the reason assigned being that it was the owner's fault that he lost it.

(a) 2 Halsbury's Statutes 39.

(b) 2 Halsbury's Statutes 35.

(c) 2 Halsbury's Statutes 66.

(d) 2 Halsbury's Statutes 76.

(dd) Chalmers' *Bills of Exchange*, 10th ed., p. 237.

(e) *Smith v. Sheppard* (1776), cited *Chitty on Bills of Exchange*, 11th ed., p. 278.

Definition of holder

The definition of holder in the Act merely requires 'possession', without in any way limiting it to lawful possession, or involving any question of title; and therefore payment in due course to the person in possession, even though he be the actual thief, operates as a discharge on the bill. Sir Mackenzie Chalmers says that a defective title must be distinguished from entire absence of title. A person who claims under a forgery has no title and can give none. He is not the 'holder' of the instrument.

It is submitted that these words only apply to the specific case of forged indorsement, which is a matter of special enactment under s. 24 (*f*). It would not be true to say that a person who has no title cannot be the 'holder'. Even where there is a forged indorsement, a man may be, for some purposes, a holder in due course (*g*). As to 'holder' under crossed cheques sections see *ante*, p. 156.

With regard to paying bearer cheques, the matter is made quite clear by the judgment in *Charles v. Blackwell* (*h*). Speaking of lost or stolen bearer cheques, the Court say:

"The matter is equally clear on principle, for where the banker paid the bearer of such a cheque, he obeyed the mandate of his customer, the drawer, and could charge him accordingly; while, on the other hand, the customer was protected, and this even though the bearer so paid had no property in the cheque, but was himself a thief who had stolen it. The drawer was entitled to say to the payee, 'I gave you an instrument which you were willing to take in satisfaction of your debt if the drawee paid the amount to the bearer, and this the drawee has done'."

Thus payment in due course by the banker of an uncrossed bearer cheque to anyone presenting it discharges not only the banker, but, if the cheque had reached the payee, discharges the drawer, both as to cheque and consideration.

Question of true owner maintaining conversion

The question has sometimes been suggested whether, notwithstanding the discharge of the cheque, the true owner could not, in this and similar cases, maintain an action against the banker for trover or conversion. A thief cannot acquire property in the cheque by stealing it; no one can acquire a valid title under a forged indorsement. The bank who pays a cheque to such a holder has dealt with the property in a way inconsistent with the rights of the true owner in whom the property and right of possession remain vested. Further, it is said that the bank cannot set up that, being discharged, the cheque is a valueless article and the damages nominal, inasmuch as it was their own act that made it so.

(*f*) 2 Halsbury's Statutes 46.

(*g*) See s. 55, sub-s. 2 (b); 2 Halsbury's Statutes 64.

(*h*) (1877), 2 C.P.D., at p. 158; 3 Digest 237, 663.

But in *Charles v. Blackwell* (j) the Divisional Court (LORD COLERIDGE, C.J., BRETT and LINDLEY, JJ.) distinctly held that if the cheque was properly paid, neither trover nor conversion would lie against the banker; and the Court of Appeal (k) adopted this view (l), taking the additional ground that, on payment, the property in the cheque passed from the payee or those claiming through him.

It may be taken, then, that whenever a banker pays a cheque without contravening any statutory enactment, and in such a manner that, either at common law or by virtue of any statute, that payment, though made to an unlawful holder or possessor, operates as a discharge of the cheque, he is under no liability to the true owner for conversion or trover.

If he pays contrary to statutory enactment; if, for instance, he pays a cheque crossed specially to more than one banker, not being crossed to an agent for collection being a banker, or if he pays so as to deprive himself of statutory protection, as, for instance, a cheque with a forged indorsement, contrary to the ordinary course of business, then his liability to the true owner remains, apart from any express right given to the true owner by statute; and it would seem that the liability would be the full face value of the cheque, notwithstanding it might have been discharged, as in the case of a bearer cheque crossed as above mentioned. See *per* BLACKBURN, J., in *Smith v. Union Bank of London* (m), at which date (1875) it must be remembered that there was a general statutory prohibition against paying crossed cheques contrary to the crossing, but there was no special remedy given to the true owner against the banker so paying; while s. 19 of the Stamp Act, 1853 (n), contained no provision limiting the protection for payment on forged indorsement to payment in the ordinary course of business, as does s. 60 of the Bills of Exchange Act, 1882 (o).

The remarks of BLACKBURN, J., are couched in wide terms, but they must probably be confined to cases where the payment is made in contravention of some statutory provision, or in such a manner as to preclude it from being a statutory discharge (p).

Where such payment is a contravention of the customer's order, as when a crossed bearer cheque is paid over the counter, the banker, in addition to his liability to the true owner, may be unable to debit the customer (q).

(j) (1876), 1 C.P.D. 548.

(k) *Id.* p. 164.

(l) 1 Halsbury's Statutes 543.

(m) See *Smith v. Union Bank of London* (1875), 1 Q.B.D., at p. 35; 3 Digest 241, 683.

(n) See *post*, p. 211, 'Paying Crossed Cheques'.

(k) (1877), 2 C.P.D. 151.

(m) (1875), L.R. 10 Q.B. 291.

(o) 2 Halsbury's Statutes 66.

CHAPTER 12

PAYING ORDER CHEQUES

General position

The principle to be borne in mind in dealing with this subject is that, in ordinary cases, the banker cannot charge his customer with any money with which he has parted without that customer's authority. If the customer says 'Pay bearer', and the banker pays the bearer, that is a good payment as against the customer, though the bearer was not himself entitled to receive the money. But when the customer says 'Pay A. B. or order', the mandate is only fulfilled by paying either A. B. or some person to whom A. B. has transferred his rights in manner authorised by the drawer, namely, by a genuine indorsement. The Bills of Exchange Act, s. 24 (a), precludes the possibility of anyone acquiring title to the bill or its proceeds, or giving a valid discharge, where a forged indorsement intervenes. On both grounds, that of having paid contrary to instructions, and having paid a person not entitled to give a discharge, the banker, apart from statutory protection or estoppel, is not in a position to debit his customer with money paid on a cheque with a forged indorsement.

The statutory protection with regard to cheques is under s. 60 of the Bills of Exchange Act, 1882 (b); with regard to drafts and orders drawn on a banker, not strictly falling within the definition of cheques, it is under s. 19 of the Stamp Act, 1853 (c).

In *Bissell & Co. v. Fox Brothers & Co.* (d) both the above provisions were treated as applying indiscriminately to cheques. It would seem, however, that, by the combined action of s. 24 and s. 60 of the Bills of Exchange Act, 1882, s. 19 of the Stamp Act, 1853, is impliedly repealed, so far as bills and cheques are concerned (e). This was the view taken by the Court in *Carpenters' Co. v. British Mutual Banking Co., Ltd.* (f). The two sections are so dissimilar that they cannot possibly co-exist with reference to the same subject-matter, though they were treated as so co-existent in *Bissell & Co. v. Fox Brothers & Co.* (g).

(a) 2 Halsbury's Statutes 46.

(b) 2 Halsbury's Statutes 66.

(c) 1 Halsbury's Statutes 543.

(d) (1884), 51 L.T. 663; varied (1885), 53 L.T. 193; 3 Digest 241, 684.

(e) Cf. *Gordon's Case*, [1903] A.C., at p. 251; 3 Digest 240, 676.

(f) [1938] 1 K.B. 511; [1937] 3 All E.R. 811; Digest Supp.

(g) (1885), 53 L.T. 193; 3 Digest 241, 684.

There are, however, certain points in common between the two sections which may be dealt with concurrently to show the elements essential for a document to come within either. They are as follows :

Bills of Exchange Act, 1882, s. 60—

“When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.”

Stamp Act, 1853, s. 19—

“... any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be endorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer of any endorser thereof.”

Requisites for protection

The instrument must be a bill, draft, or order drawn on a banker, payable to order on demand.

Bill, draft, or order

The document must be a bill, draft, or order. The latitude of interpretation involved in the decision in *Gordon's Case* renders it difficult to fix any definite limitations on the documents which may fall within the extended scope of this definition. A document may not be a cheque or bill, for want of some essential element, but the words ‘draft or order’, of which there is no authoritative definition, are there to supply the deficiency.

Must be drawn on a banker

The document must be drawn on a banker. By the decision in *Gordon's Case* this does not necessarily involve it being drawn by a customer. It may be drawn by a branch of a bank on another branch or the head office. As to orders drawn by local authorities on their treasurer at a bank, see *ante*, p. 141. This condition, however, absolutely excludes bills accepted payable at a banker's or domiciled with him. Such bills, even if payable on demand and to order, are not drawn on a banker.

Must be payable to order and negotiable

The document must be payable to order. This seems to involve the necessity of the document being negotiable. A

document cannot be payable to order unless any indorsee has a right to sue on it by virtue of his own independent title, which is the essence of negotiability. This is further emphasised by the reference to the indorsement of the payee and subsequent indorsers, if any, which occurs in both enactments, words only applicable to an instrument negotiable by indorsement.

The banker's draft in *Gordon's Case*, though not a bill, because drawer and drawee were the same person, was yet an instrument which, both at common law (*h*) and under the Bills of Exchange Act, s. 5, sub-s. 2 (*j*), must be treated as negotiable, either as a bill of exchange or as a promissory note. The *Gordon* decision, therefore, does not militate against the restriction that the instrument must be negotiable.

Anything which would be fatal to the character of a document as a bill in the hands of a holder in due course is sufficient to exclude it from protection under either section.

Must be unconditional

The instrument must, therefore, be unconditional, in the sense in which the term is used in the Bills of Exchange Act, which, in this respect, merely reproduces pre-existing law.

This requirement would exclude all documents requiring the signature of a specific receipt as a condition of payment, the sort of documents covered by s. 17 of the Revenue Act, 1883 (*k*); apart from the special provision in that section that such documents are not negotiable instruments (*l*). LORD LINDLEY says in the *Gordon Case* (*m*), speaking of documents of this class :

"Nor do they come within s. 19 of the Stamp Act of 1853, which, as I have already observed, applies only to banks which are drawees."

The documents in that case were not drawn on the appellant bank, and so the section obviously afforded no defence. It would not be fair to interpret this somewhat ambiguous *dictum* as an authority one way or the other.

The outcome would seem to be that the paying banker is protected if these documents are crossed, not if they are uncrossed, and even with regard to the crossed ones there is the doubt raised by the *dictum* of SCRUTTON, L.J., in *Underwood's Case*, referred to *ante*, p. 128.

The requirement that the document shall be payable to order has another result. If it is a bill within the Bills of Exchange Act, it is sufficient if it be expressed to be payable to order of a specified person, or to him or to his order, or to him, without words prohibiting transfer (*n*).

(*h*) *Miller v. Thomson* (1841), 3 Man. & G. 576 ; 6 Digest 37, 260.

(*j*) 2 Halsbury's Statutes 38.

(*k*) 16 Halsbury's Statutes 547.

(*m*) [1903] A.C. 240, at p. 252.

(*l*) See *ante*, p. 127.

(*n*) S. 8 ; 2 Halsbury's Statutes 39.

Under Stamp Act must be expressed to be to order

But if protection has to be sought under s. 19 of the Stamp Act, 1853, it can only be obtained where the draft or order is expressly made payable to the order of a specified person, or to him or his order.

Section 8 of the Bills of Exchange Act (o) only applies to documents which are bills within its meaning, leaving other drafts and orders still regulated by the pre-existing law, which required the express addition of the word 'order' to render the instrument transferable or payable to order.

Must be payable on demand

The document must be payable on demand.

How far this requirement excludes documents which, though stated or implied to be payable on demand, contain a restriction that they will only be paid if presented within a specific period, has been previously discussed (p). In *Thairwall v. Great Northern Railway Co.* (q) a Divisional Court held that such a provision did not render the document conditional. The question was not, however, raised there whether the intimation was addressed to the drawee or only to the payee, and this might well prove the deciding factor in any future and similar case.

It would not exclude a post-dated cheque, though known to be such, if presented on or after the ostensible date; the legality of such instruments being fully established by the Bills of Exchange Act, s. 13, sub-s. 2 (r), they must clearly be treated as payable on demand (s).

Divergence of the statutory enactments

In treating further of the protection of the paying banker against forged indorsements, it becomes necessary to deal separately with s. 60 of the Bills of Exchange Act and s. 19 of the Stamp Act, 1853, by reason of the divergence of their terms.

Provisions of s. 60 (t)

Take s. 60 first, as of the more general application. It must be borne in mind that this section only refers to documents which are properly bills or cheques within the meaning of the Bills of Exchange Act. It provides that, to entitle him to its protection, the banker must pay the cheque "in good faith and in the ordinary course of business".

(o) 2 Halsbury's Statutes 39.

(p) See *ante*, p. 107.

(q) [1910] 2 K.B. 509; 6 Digest 15, 34.

(r) 2 Halsbury's Statutes 41.

(s) See *ante*, p. 111, under heading 'Post-dated Cheques'.

(t) 2 Halsbury's Statutes 66.

Definition of payment

Payment need not be by the absolute transfer of money or money's worth to the holder. The word 'payment' in the Act is widely interpreted (u). In *Meyer & Co., Ltd. v. Sze Hai Tong Banking and Insurance Co., Ltd.* (w), the Privy Council held that where a bank paid across the counter a crossed cheque by giving its own cheque on another bank, this was payment of the cheque within s. 81 (y).

Where a cheque drawn on one branch of a bank was paid in at another and appeared as an item in balancing the accounts between the two branches, the branch on which it was drawn was held to have paid it within the meaning of s. 60 (z).

But it may be safely asserted that the intimation that the cheque will be paid, known as notifying its fate, in answer to an inquiry by another banker, would not be treated as payment, though often regarded as equivalent thereto by bankers. If, after giving such answer, the paying banker became cognisant of facts tending to throw doubt on the genuineness of the indorsement, he would subsequently pay the cheque at his peril. The only light in which courts regard the question and answer as to the fate of a cheque is that of a precaution taken by the collecting banker exclusively in his own interest and for his own benefit (a).

Must be in good faith and ordinary course of business

The payment must be "in good faith and in the ordinary course of business" (b).

Question of negligence

It is difficult to conceive, still more to formulate, conditions involving absence of good faith on the part of a corporation, such as a joint stock bank, with relation to paying cheques. Section 60 does not, as does s. 80 (c), with regard to the banker paying, and s. 82 (d) with regard to the banker collecting, a crossed cheque, make the absence of negligence a condition of the protection. Negligence is not incompatible with good faith. Bills of Exchange Act, s. 90 (e) :

"A thing is deemed to be done in good faith within the meaning of this Act if in fact it is done honestly, whether it is done negligently or not."

(u) See *Glasscock v. Balls* (1889), 24 Q.B.D., per LORD ESMER, M.R., at p. 16 ; 6 Digest 343, 2279.

(w) [1913] A.C. 847 ; 3 Digest 215, 540. (y) 2 Halsbury's Statutes 76.

(z) *Gordon v. London City and Midland Bank, Ltd.*, [1902] 1 K.B. 242 ; cf. *Bissell & Co. v. Fox Brothers & Co.* (1885), 53 L.T. 193 ; 3 Digest 238, 666.

(a) See, e.g., *Bissell & Co. v. Fox Brothers & Co.* (1884), 51 L.T. 663 ; varied (1885), 53 L.T. 193 ; 3 Digest 238, 666 ; *Ogden v. Benas* (1874), L.R. 9 C.P., at p. 516 ; 3 Digest 242, 692.

(b) Bills of Exchange Act, s. 60 ; 2 Halsbury's Statutes 66.

(c) 2 Halsbury's Statutes 75.

(d) 2 Halsbury's Statutes 76.

(e) 2 Halsbury's Statutes 79.

This s. 90 was presumably inserted to set at rest doubts which were at one time entertained as to whether negligence on the part of the transferee of a negotiable instrument was sufficient to affect him with equities thereon ; but it is general in its terms, and the banker is entitled to any benefit derivable from it. As before stated (*f*) there is authority for the proposition that a banker cannot charge the customer with losses incurred by the banker's negligence ; indeed, such is only the natural result of the relation of agent to principal. The omission of any reference to negligence in s. 60, whereas it is included in s. 80, excludes any question of negligence in the particular case of forged indorsement, save in so far as the negligence consists in departure from ordinary course of business.

Negligence may, of course, be so gross as to be evidence of want of good faith, but that is not a principle likely to be applicable in the case of a banker.

Ordinary course of business

As to ordinary course of business, there are some obvious derelictions. Payment of a crossed cheque contrary to the crossing would never be in the ordinary course of business ; nor of an order cheque bearing an irregular indorsement (*ff*). As to payment of an order cheque presented unindorsed by a person who writes the payee's name on the back at the request of the bank, see *ante*, p. 111.

In the majority of cases, however, the usual course of business is a matter on which bankers are best qualified to judge, and Courts would be largely influenced by the evidence of persons experienced in banking on such questions.

But 'ordinary course of business' must be the recognised or customary course of business of the banking community at large, not of any particular bank or group of banks (*g*) ; and the Court, while according weight to the evidence of bankers, might well reject anything which savoured of rashness or indifference to the interests of the customer or true owner. The Court might either decline to believe it to be the usual course of business or would import into the section that the course of business must be not only usual but reasonable.

Payment over counter of large sums

Take the question of paying a bill or uncrossed cheque for a large amount over the counter. LORD HALSBURY in *Bank of England v. Vagliano Brothers* (*h*) said :

(*f*) *Ante*, p. 166.

(*ff*) See also *Slingsby v. District Bank, Ltd.*, [1931] 2 K.B. 588, *per* WRIGHT, J., at pp. 595 *et seq.*

(*g*) Cf. *Rickford v. Ridge* (1810), 2 Camp. 537 ; 3 Digest 201, 457 ; *Lloyds Bank, Ltd. v. Swiss Bankverein* (1913), 108 L.T., at p. 146 ; 3 Digest 276, 861.

(*h*) [1891] A.C., at p. 107 ; 3 Digest 244, 703.

"I do not know what is the usual course among bankers, and I should doubt whether in such a matter it would be possible to affirm that any particular course was either usual or unusual in the sense that there is some particular course to be pursued when circumstances occur necessarily giving rise to suspicion. I can well imagine that on a person presenting himself whose appearance and demeanour was calculated to raise a suspicion that he was not likely to be entrusted with a valuable document for which he was to receive payment in cash, I should think it would be extremely probable that, whether the document were a cheque payable to bearer for a large amount or a bill, the counter clerk and banker alike would hesitate very much before making payment."

In *Auchteroni & Co. v. Midland Bank, Ltd.* (i), where the bank had paid a bill for £876 : 9s. to plaintiff's cashier over the counter, WRIGHT, J., quoted the above, and held the bank justified in so paying. He agreed that a different course might reasonably be adopted if a bill for a larger amount was presented by, say, an office boy or a tramp. In *Baines v. National Provincial Bank, Ltd.* (j), a cheque was paid at 3.5 p.m., closing time being 3 p.m. LORD HEWART, L.C.J., held such payment good, but says :

"The general question of limits of time within which a bank may conduct business, having prescribed, largely for its own convenience, a particular time at which the doors of the building will be closed, is a large question, not raised here."

In the *Joachimson Case*, ATKIN, L.J., defines the banker's promise to repay as 'during banking hours'; see *ante*, p. 30.

The author repeats here an opinion previously expressed by him which has been disputed, namely, that the indulgence sometimes afforded customers, on holidays, or otherwise temporarily absent from home, of drawing on branches other than that at which their account is kept, is not within the ordinary course of business.

The mere internal formalities of banking probably do not count for much in the ordinary course of business exacted by the section. Absence of the usual collecting banker's stamp, for instance, would not imperil the banker's position.

Presentment by post

Presentment for payment by post is sufficient where authorised by agreement or usage (k), but it is not the custom of bankers to comply with a letter from an unknown private person enclosing a cheque ostensibly indorsed, and asking for the amount to be remitted in notes by post. Were the notes sent, the payment would presumably not be in the ordinary course of business.

(i) [1928] 2 K.B. 294 ; Digest Supp.

(j) (1927), 96 L.J.K.B. 801 ; Digest Supp.

(k) Bills of Exchange Act, 1882, s. 45 (8) ; 2 Halsbury's Statutes 57.

Correctness of indorsement

The cheque must purport to be indorsed by or under the authority of the proper person.

There used to be a superstition that the paying banker was not concerned with the indorsements on an order cheque. Such an idea is, of course, utterly opposed to the whole drift of s. 60, and if a patent irregularity in the indorsements were overlooked or disregarded by the banker, it would be hopeless for him to invoke the protection of s. 60. If, for instance, there was a special indorsement following a blank indorsement, he would be bound to have or get the indorsement of the special indorsee.

The indorsement must be a signature or the corresponding execution in the case of a corporation.

"It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient." (1)

A cheque payable to Mrs. A. B. is not properly indorsed 'Mrs. A. B.'; one payable to 'General C. D.' is not properly indorsed 'General C. D.'; on one to the 'Duke of E.', 'Duke of E.' would be rejected as an indorsement. These are not signatures, nor do they 'purport to be', within s. 60. A bill may be payable to the holder of an office for the time being or order, but the payee cannot sign by merely affixing the title of his office; he must sign his name and add his description, tallying with the form in which the cheque is made payable to him.

Some banks seem to entertain very broad views as to the correspondence of the indorsement with the designation of the payee. Of some of the indorsements passed it would be impossible to say that they 'purport to be' the indorsement of the payee; others may so purport, but in such form that payment thereon is hardly in the ordinary course of business. Other banks seem over-scrupulous in returning cheques on account of utterly immaterial variations or omissions. In particular the punctiliousness sometimes exhibited with regard to the indorsements of married women strikes one as somewhat exaggerated. A cheque to 'Mrs. A. B.', according to some banks, must be endorsed with the wife's Christian and surname followed by 'wife of So-and-so B.', and there are all sorts of refinements as to widows, and cheques payable to married women under their maiden names. Save possibly in the last instance, where there is a substantial variation, the ordinary signature would surely be sufficient. It would be futile to endeavour to deal here with specific instances. A large collection of examples will be found in *Questions on Banking Practice*, 8th ed., with the opinion of the Council of the Institute of Bankers on each.

(1) Bills of Exchange Act, 1882, s. 32 (1); 2 Halsbury's Statutes 50.

In *Slingsby v. District Bank, Ltd. (m)*, it was held that the proper indorsement of a cheque drawn to 'A. per B.' would indicate that B. was signing in a representative capacity, the "Journal of the Institute of Bankers" for December, 1930, and *Questions on Banking Practice* being quoted with approval by WRIGHT, J., in the lower Court. "But I think the paying bank ought to require a signature indicating the position exactly as it is as indicated by the mandate describing the payee" (n).

There is one form of indorsement which must, however, be referred to, because it is not uncommonly passed, and can only be justified by the comity of bankers. A cheque payable to 'A. B. or order' is presented for payment without any indorsement by A. B., the only indorsement being 'Placed to account of payee', or words to that effect, signed by or on behalf of a banker. This does not even purport to be the indorsement of the payee, and payment thereon cannot be in the ordinary course of business.

Indorsement in foreign characters

In foreign cheques it sometimes happens that the name of a payee or special indorsee is expressed in English letters, while the place of the indorsement is occupied by Arabic, Hindustani, or some other characters totally different. Unless the banker has personal knowledge of the particular language, it would seem doubtful whether the mere position on the cheque of hieroglyphics conveying nothing to his mind brings the case within s. 60. The 'good faith' has no intelligent basis, the characters scarcely 'purport' anything to one to whom they convey no meaning, and 'the ordinary course of business' would suggest verification. As BUCKLEY, L.J., said in *Carlisle and Cumberland Banking Co. v. Bragg (o)* :

"If a document were presented to me written in Hebrew or Syriac, I should for the purposes of the document be both blind and illiterate, blind in the sense that, although I saw some marks on the paper, they conveyed no meaning to my mind, and illiterate as regards the particular document, because I could not read it." (oo)

SIGNATURES BY DEPUTED AUTHORITY

The indorsement or other execution of bills and cheques by a company is regulated by s. 30 of the Companies Act, 1929 (p) :

"A bill of exchange or promissory note shall be deemed to have been made, accepted, or indorsed on behalf of a company if made, accepted, or indorsed in the name of or by or on behalf or on account of the company by any person acting under its authority."

(m) [1932] 1 K.B. 544 ; Digest Supp.

(n) [1931] 2 K.B. 588, at p. 597.

(o) [1911] 1 K.B., at p. 496 ; 21 Digest 400, 1603.

(oo) Such indorsements are the subject of a memorandum by the Council of the Institute of Bankers published in the Journal, vol. xxxi, p. 468.

(p) 2 Halsbury's Statutes 791.

Section 60 of the Bills of Exchange Act covers both forgery and unauthorised signature so that the recent cases relating to verification of a company officer's authority to indorse, and the effect of his forging or misusing an indorsement, dealt with under 'Special Customers, Joint Stock Companies', have no bearing on the present matter.

It is a perfectly sufficient indorsement of a cheque payable to the company if it be indorsed simply with the name of the company, so long as it agrees with the description of that company as payee. It has even been held that the company's name need not necessarily be included in an acceptance on its behalf (g), but this view is contrary to other authorities. Section 60 draws no distinction between the indorsements of companies and individuals. Bankers, however, while admitting that the mere name of the company is a sufficient indorsement in law, regard it in practice as irregular, and claim that bills and cheques should be indorsed 'per pro.' the company, or if other words than 'per pro.' are used, such as 'for' or 'on behalf of', the signatory must add his official position to his name.

The discussion whether there is any essential difference between 'per pro.' and other forms of deputed signature seems, for the time being, to incline to the view that 'per pro.' does indicate special deputed powers, while 'for', 'on behalf of', and similar phrases are less definite.

Up till quite recently the only authority on which such contention rested was *O'Reilly v. Richardson* (r), of which Chalmers says (s) :

"A distinction is drawn between an acceptance signed 'p.p. J. B., T. S.', and one signed 'For J. B., T. S.' The distinction does not seem founded on any clear principle. The case can be supported on other grounds."

And he cites cases to the contrary. But in his dissentient judgment in *McDonald & Co. v. Nash & Co.* (t) SCRUTTON, L.J., says :

"The other point is that F. W. Nash, who signed for Nash & Co., had no authority to sign in that way, and that the form 'for' gave notice of agency and put the other parties on enquiry. This is the effect of the signature 'per pro.' under s. 25 of the Act (u). On this point I refer to the careful judgment of Chief Baron Pigott in *O'Reilly v. Richardson*, with which I agree. He limits the cases in which one is put on enquiry to cases where the form of signature shows a special and limited authority as 'per procuration' or 'under power of attorney', and excludes cases of a general authority as 'A. for B.'"

The other L.JJ. decided on grounds which made this point immaterial, and they did not deal with it. This was a case of

(g) *Per* SCRUTTON, J., in *Stacey & Co., Ltd. v. Wallis* (1912), 106 L.T. 544 ; 1 Digest 648, 2677.

(r) (1865), 17 I.C.L.R. 74 ; 6 Digest 109, 747 i.

(t) [1922] W.N. 272, C.A.

(s) 10th ed., p. 91.

(u) 2 Halsbury's Statutes 46.

taking a bill as transferee in which s. 25 operates. In a similar case, *Alexander Stewart & Son of Dundee, Ltd. v. Westminster Bank, Ltd.* (w), ATKIN, L.J., was disposed to agree with SCRUTTON, L.J. But the wording of s. 60, let alone the obvious impossibility of a paying banker going into questions of indorsements other than those of his own customer, excludes any importation of s. 25 into the matter. Section 25 was held in *Morison v. London County and Westminster Bank, Ltd.* (x), not to affect s. 82 (though LORD ATKIN, in *Midland Bank, Ltd. v. Reckitt* (y), declined to limit the "period within which alone the section (25) affects legal rights", and the argument as to s. 60 is far stronger. But if the representative capacity is added to the signature, it is, no doubt, incumbent on the banker to see that the representative capacity stated is reasonably compatible with authority to indorse. Office boy, porter, and subordinate offices like that should not, of course, be accepted. Payment on such indorsement would not be in the ordinary course of business. This is a natural incident of s. 60, which section, in the author's opinion, covers every form of signature by delegated authority.

Position of 'per pro.'

There are further differences of opinion as to the proper form of a definite 'per pro.' signature. 'Per pro. James Brown, John Smith', is said to be correct. 'James Brown, per pro. John Smith' is said to be wrong. And yet, if the object is, as it must be, to get as near an actual signature as possible, one would think the latter form the more appropriate, as meaning 'This is the signature of James Brown affixed by his authority by me, John Smith', whereas the former might fairly be interpreted, 'By the authority of James Brown I sign myself John Smith'. This opinion was quoted with approval by SCRUTTON, L.J., in *Slingsby v. District Bank, Ltd.* (z), in dealing with the indorsement of a cheque drawn in the form 'A. per B.'

If the Latin of the *per procuracionem* be extended to the signatures, this seems to be the legitimate interpretation.

The 'A. B. per pro. C. D.' sequence is the one common in Scotland and in Canada.

It is to be noted that in *Charles v. Blackwell* (a) the very case to which bankers owe the extension of their immunity under s. 60 to 'per pro.' indorsements, the words 'per pro.' occur between the two names, not before that of the principal.

Drawer's signature forged

It is probably unnecessary to say that s. 60 affords no pro-

(w) [1926] W.N. 271.

(x) [1914] 3 K.B. 356; 3 Digest 242, 690.

(y) [1933] A.C. 1; Digest Supp.

(z) [1932] 1 K.B. 544; Digest Supp.

(a) (1877), 2 C.P.D. 151; 3 Digest 237, 665.

tection whatever to the banker where the customer's signature as drawer is forged. A document purporting to be a cheque, but to which the drawer's signature is forged, is not a cheque at all, is not drawn on a banker (b), and is outside the section altogether (c).

Knowledge of customer's signature

The foundation of the protection of the banker against forged indorsement has been frequently stated to be the impossibility of his knowing the signatures of all persons indorsing order cheques drawn by his customer. Often this statement occurs in contrast to one to the effect that a banker "is or ought to make himself acquainted with the signatures of his own customers" (d). If this implies legal obligation, it would afford another reason why the banker should not be protected against forgery of his customer's signature. Later cases (e) expose the fallacy of there being any such legal duty, or deception of the banker by a cunning forgery being a breach of it or constituting negligence, and leave the banker's inability to charge his customer on the true ground of payment without authority.

Banker's double risk

In any case where a banker, in paying an order cheque with a forged indorsement, so acts as to deprive himself of the protection of s. 60, he would appear to stand to lose the money twice. He is not entitled to charge his customer with the money paid on the forged indorsement, so he loses that. Then he would be liable to the true owner, if, as he probably would be, he is a person other than the customer, in trover or conversion for wrongfully dealing with the cheque, the damages for which would be its full face value. Neither the property nor the right of possession is divested out of the true owner by the forgery of his indorsement. The payment, therefore, was to a mere possessor, and, unless protected or operating as a discharge of the cheque, constitutes a conversion (f).

It is true that where a cheque is duly paid or discharged, conversion will not lie against the banker (g). But to constitute payment on a forged indorsement payment or discharge

(b) *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49 ; 3 Digest 233, 646.

(c) See also *Bank of England v. Vagliano Brothers*, [1891] A.C. 107 ; 3 Digest 244, 703 ; *Ott and Barber v. Union Bank of Scotland* (1854), 1 Macq. 513 ; 3 Digest 253, 750.

(d) See, e.g., *Charles v. Blackwell* (1877), 2 C.P.D., at p. 156 ; 3 Digest 237, 663.

(e) E.g., *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q.B. 7 ; 6 Digest 107, 737.

(f) See *Smith v. Union Bank of London* (1875), L.R. 10 Q.B., per BLACKBURN, J., at p. 296 ; and affirmed, 1 Q.B.D., at p. 35, per LORD CAIRNS ; 3 Digest 241, 683.

(g) *Charles v. Blackwell* (1876), 1 C.P.D. 553.

under s. 60, it must be made strictly in accordance with the terms of that section.

Artificial discharge

In any case the discharge is a purely technical and exceptional one.

Section 59 (1) (h) provides that

“A bill is discharged by payment in due course by or on behalf of the drawee or acceptor. ‘Payment in due course’ means payment made at or after the maturity of the bill to the holder thereof, in good faith and without notice that his title to the bill is defective.”

By s. 2 (j) ‘holder’ is defined as the

“payee or indorsee of a bill, or note, who is in possession of it, or the bearer thereof.”

Section 24 (k) declares the total inefficacy of a forged indorsement to convey any title or the right to give a discharge.

No holder under forged indorsement

The person in possession under a forged indorsement is, therefore, neither payee, indorsee, nor bearer; payment to him can never be payment in due course, or operate as a discharge or a valid payment, except where s. 60 takes effect, and the banker is deemed to have paid the cheque in due course. ‘Deemed’ in this connection must be read as importing the equivalent of the actual fact, and as putting matters on precisely the same basis as if the payment had been made in the manner in which it is deemed to have been made, such construction being necessary for the efficacy of the section (l).

Apparent exception explained

The apparent possibility of an exception to the absolute inefficacy of a forged indorsement to constitute a holder, arising from the application of the words ‘holder in due course’, in s. 55, sub-s. 2 (b) (m), to a person in possession of a bill in the course of negotiation of which there is, *ex hypothesi*, at least one forged indorsement, is explainable, and does not touch the general principle.

The term is there only used to denote the character in which a person must have taken the bill, namely, in good faith and for value, and before it was overdue, in order to enable him to maintain a right of recourse by estoppel against an indorser subsequent to the forged indorsement. Such subsequent indorser is precluded from denying to such person in

(h) 2 Halsbury's Statutes 66.

(j) 2 Halsbury's Statutes 35.

(k) 2 Halsbury's Statutes 46.

(l) Cf. *Hill v. East and West India Dock Co.* (1884), 9 App. Cas. 448; 4 Digest 11, 7.

(m) 2 Halsbury's Statutes 64.

possession the status of holder, so far as claiming against himself on the dishonoured bill is concerned ; but this does not touch the main question or imply that payment to such a person by drawee or acceptor would be a valid discharge of the bill.

Therefore, it remains that, save where strictly in accordance with s. 60, payment of a cheque with a forged indorsement does not constitute payment or discharge of the instrument, relieve the banker from liability to conversion at the suit of the true owner, or entitle him to debit the customer.

Crossed cheque with forged indorsement

In the case of a crossed cheque bearing a forged indorsement, the banker is protected, in proper cases, both by s. 80 (n) and by s. 60, equally against his own customer and against the true owner ; but inasmuch as s. 80 limits the protection by the requirement of good faith and the absence of negligence on the part of the banker, it is obvious that conduct amounting to a violation of the ordinary course of business, within s. 60, would, as negligence, equally debar the banker from the benefit of s. 80. Nor could the banker, who paid a cheque with a forged indorsement, contrary to the crossing or the ordinary course of business, set up against the true owner the line of defence suggested by *Charles v. Blackwell* (o), namely, that the document, if recovered, would be valueless, inasmuch as its subsequent non-payment on presentation would not be dishonour, such non-payment being on the ground only of previous payment, effective by statute, though to the wrong person ; and that, therefore, there was no right of recourse against the drawer or any previous indorser.

The cheque with forged indorsement, paid contrary to the crossing or ordinary course of business, is not discharged, because the previous payment was not in accordance with the section ; but the true owner could not sue any party, either on the cheque itself or on the consideration, until the cheque has been presented and dishonoured. The true owner cannot present it, because the bankers have got it, or had and parted with it ; therefore he is entitled to sue them in damages for its conversion. And if they had to pay its face value as such damages, there still seems no legal ground on which they could charge the amount against the customer. It would not in law be payment of the cheque, or payment on the cheque ; but merely damages for a wrong of the banker's own, in its nature as separate from any question of the drawer's relation to the cheque as if it had been an assault.

Charles v. Blackwell, *supra*, seems to contemplate the possibility of the banker's returning the cheque to the true owner as a means of escaping liability for conversion. If the banker

(n) 2 Halsbury's Statutes 75

(o) (1877), 2 C.P.D. 151 ; 3 Digest 237, 665.

still had it, he might do this ; the cancellation of the drawer's signature might be shown to have been made under mistake (*p*), and the cheque might be paid on indorsement and re-presentation unless stopped meantime. If it had been stopped and payment were refused, the true owner might recover against the drawer. Possibly thus the banker might escape the second loss, but the true owner might well decline to take the cheque back ; it is not a case in which the Court would stay his action. The banker might try to arrange with true owner to take it back and indorse it for value to him, present it to himself and pay : if stopped, sue the customer. These are, however, rather counsels of desperation.

If the cheque were not crossed, action against the banker by true owner is pure conversion : payment of full value as damages vests the property in the banker. If crossed, action is either conversion or special under s. 79 (*q*). Either way the true owner could not get his money again from the customer, and it would be unreasonable and shabby in the customer if he refused in such case to be debited.

Protected payment discharges drawer

Where the payment, although on a forged indorsement, is strictly in accordance with s. 60, and, if the cheque is crossed, with s. 80, the payment, though, as before stated, only technically a payment in due course, not only discharges the banker, but, if the cheque had actually or constructively reached the payee, discharges the drawer from liability, not only on the cheque, but also on the consideration given for it. This is well illustrated in *Charles v. Blackwell*. The payee cannot sue, either on the cheque or the consideration, until the cheque is dishonoured. If he had it and presented it, true it would not be paid ; but only, as before stated, on the ground that it had been previously paid, which is not dishonour. The payee says, "Yes, but to the wrong person". The drawer says, "You were content to take for your debt a document which would be discharged if the banker paid it in accordance with existing law, and this he has done, and you cannot complain". The same reasoning would lie in the mouth of any indorser.

Documents within the Stamp Act, 1853, s. 19 (*r*)

Turning now to s. 19 of the Stamp Act, 1853, which regulates the protection of the banker with regard to drafts or orders, not being cheques or bills within the Bills of Exchange Act, that section does not contain any words requiring the payment to be made in good faith or in the ordinary course of business. It simply provides that if the draft or order shall, when presented for payment, purport to be indorsed by the

(*p*) S. 63, sub-s. 3 ; 2 Halsbury's Statutes 67.

(*q*) 2 Halsbury's Statutes 75.

(*r*) 1 Halsbury's Statutes 543.

person to whom it is drawn payable, it shall be a sufficient authority to the banker to pay the amount to the bearer, and it shall not be incumbent on the banker to prove that any indorsement was made by, or with the authority of, the payee or subsequent indorsers.

It is, at any rate, clear that the payment must be made in good faith. The banker could never be allowed to take advantage of his own wrong, and the necessity of good faith is distinctly postulated in *Hare v. Copland* (s), and by BLACKBURN, J., in *Smith v. Union Bank of London* (t).

Ordinary course of business, apart from the question of negligence, does not seem a factor. In *Bissell & Co. v. Fox Brothers & Co.* (u) a payment treated as doubtful under s. 60 (w) was held good under this section. No such condition is included by Sir Mackenzie Chalmers in his *Digest of the Law of Bills of Exchange*, published before the passing of the Bills of Exchange Act, or insisted on by BLACKBURN, J., in the passage above referred to. Nor is it referred to in *Charles v. Blackwell* (y). The document in the *Gordon Case* (z) was a draft drawn by a branch bank on head office. The issue of such drafts is a recognised means of transmitting funds from abroad, and they are in common use in England. The subsequent payment might, therefore, be fairly regarded as being in the ordinary course of business, but the point was not raised or discussed.

As to foreign drafts being within s. 19 of the Stamp Act, 1853, see *ante*, 'Banker's drafts'.

As to the indorsement purporting to be that of the payee or subsequent indorser, the same rules apply as in the case of cheques.

Section 19 of the Stamp Act, 1853, does not, as does s. 60 of the Bills of Exchange Act, specifically provide that the banker who acts within its conditions shall be deemed to have paid the bill in due course, notwithstanding the forged or unauthorised indorsement. In such case, however, the section does operate to give a discharge of the draft or order (a), with the same results as are enumerated with respect to s. 60.

The section, like s. 60, has full effect though the indorsement is 'per pro.' (b). Indeed, that decision was on this section, being before the Bills of Exchange Act was passed.

(s) (1862), 13 I.C.L.R., at p. 433; 3 Digest 238, e.

(t) (1875), L.R. 10 Q.B., at p. 296.

(u) (1885), 53 L.T. 193; 3 Digest 238, 666.

(w) 2 Halsbury's Statutes 66.

(y) (1876), 1 C.P.D. 548; affirmed (1877), 2 C.P.D. 151; 3 Digest 237, 665.

(z) [1903] A.C. 240; 3 Digest 239, 670.

(a) *Halifax Union v. Wheelwright* (1875), L.R. 10 Exch., at p. 194; 3 Digest 233, 641.

(b) *Charles v. Blackwell* (1876), 1 C.P.D. 548; affirmed (1877), 2 C.P.D. 151; 3 Digest 237, 665.

CHAPTER 13

PAYING CROSSED CHEQUES. MARKING CHEQUES

As being specially material with reference to this subject, it may be well to repeat that 'banker' is throughout to be read in the light of the definition of the term hereinbefore given under the heading 'The Banker'.

In 1856, the Drafts on Bankers Act enacted that where a draft on any banker made payable to bearer or order on demand bore across its face an addition, in written or stamped letters, of the name of any banker or of the words 'and company' in full or abbreviated, either of such additions should have the force of a direction to the bankers upon whom such draft was made that the same was to be paid only to or through some banker, and the same should be payable only to or through some banker. In *Simmons v. Taylor* (a) it was held that such addition was not a material part of the cheque and operated only as a direction to the banker on whom the draft was drawn.

The Drafts on Bankers Act of 1858 and the Crossed Cheques Act, 1876, the latter of which repealed the former and the Act of 1856, and is itself repealed by the Bills of Exchange Act, 1882, each contained a direct prohibition forbidding a banker to pay any crossed draft or cheque otherwise than in accordance with the crossing general or special as defined in those Acts (b).

Omission of prohibition

For some not very apparent reason, this prohibition is omitted in the Bills of Exchange Act, 1882, being only reproduced with reference to a cheque crossed specially to more than one banker except when crossed to an agent for collection being a banker (c). The inclusion of this prohibition makes the omission of the other still more remarkable. The remedy given to the true owner by s. 79 (2) (d) cannot be in substitution for the direct prohibition, since it co-existed with it in the 1876 Act. It has been suggested that the general prohibition has been dropped to get rid of the technical criminal liability of anyone who infringes a statutory provision for breach of

(a) (1858), 4 C.B.N.S. 463 ; 6 Digest 442, 2839.

(b) See Drafts on Bankers Act, 1858, ss. 1 and 2 ; Crossed Cheques Act, 1876, s. 7.

(c) S. 79 (1) ; 2 Halsbury's Statutes 75. (d) 2 Halsbury's Statutes 75.

which no specific penalty is enacted ; but if so, it is difficult to see why the direction to refuse payment is retained in the case of the cheque crossed specially to more than one banker. Such criminal liability is also too remote a possibility to constitute a practical factor in legislation.

Apart, however, from direct prohibition, the remedy given to the true owner, the deprivation of protection, and the fact that a banker paying a crossed cheque in contravention of the crossing cannot charge his customer with the amount, even, it would seem, though he has paid the true owner, inasmuch as he has paid contrary to the mandate of that customer, either direct or deputed by force of the Act to the holder, are sufficient to restrain the paying banker from disregarding any crossing.

Crossed to two bankers

As above stated, the direct prohibition is now confined to the case of a cheque crossed specially to more than one banker, except when crossed to an agent for collection being a banker (e). The limit of special crossings is two, and it would seem to be incumbent on the paying banker to satisfy himself that the second banker is the accredited agent of the first.

Liability to true owner

With regard both to cheques so crossed and all other crossed cheques, s. 79 (2) enacts that a banker paying in contravention of the crossing

"is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid."

Payment is not defined. In *Meyer & Co., Ltd. v. Sze Hai Tong Banking and Insurance Co., Ltd.* (f), payment of a crossed cheque over the counter by the bank's own cheque on another bank was held payment for this purpose.

It is open to question whether this section confers on the true owner any further or other powers than he would have independently of it. Apart from its provisions, the banker who paid a crossed cheque with a forged indorsement, contrary to the crossing, would lose the protection of s. 60 (g), as not having paid in the ordinary course of business, and would be liable to the true owner. In the case of a bearer cheque paid to a wrongful holder, prior to 1882, the banker would have been liable to the true owner, apart from this section, because he would have paid the cheque contrary to the direct prohibition contained in the 1876 Act, and so conversion would lie. With regard to bearer cheques since 1882, the question would be, apart from this section, whether the improper payment

(e) S. 77 (5), s. 79 (1) ; 2 Halsbury's Statutes 74, 75.

(f) [1913] A.C. 847 ; 3 Digest 215, 540.

(g) 2 Halsbury's Statutes 66.

which leaves the banker open to be sued by the true owner must be one directly contrary to statute as distinguished from one contrary to business rules and the manifest intention of a statute. Possibly the former is the true construction, but inasmuch as the special remedy is expressly given to the true owner by s. 79 (2), the question is not material.

The true owner

The only person to whom any remedy is given by s. 79 (2) is 'the true owner', a term not defined by the Act (*h*). There cannot be, at the same time, two true or lawful owners of a cheque, and a holder in due course must always be the true owner thereof, unless the cheque be crossed 'not negotiable', to the exclusion of any previous holder, notwithstanding that the cheque has been stolen or got by fraud from such previous holder by a person other than the holder in due course (*Smith v. Union Bank of London*) (*j*).

In that case a cheque payable to bearer by indorsement, crossed to the *London and County Bank*, was stolen. It got into the hands of a holder in due course who obtained payment through another bank.

LORD CAIRNS said, delivering judgment :

"We must say that the holder of the cheque, who presented it to the defendants, was the lawful holder, entitled to retain it against the plaintiff and all the world."

It was to meet this difficulty that the 'not negotiable' crossing was introduced; if the cheque were crossed 'not negotiable', no person could acquire an independent title as holder in due course, and the person from whom it was stolen or obtained by fraud would remain true owner, and have his remedy under s. 79 (2).

Apparently s. 79 only gives the remedy to a person fulfilling the character of true owner at the time the cheque is paid contrary to the crossing. If a cheque were issued or negotiated in circumstances making it voidable but not void, and paid contrary to the crossing, prior to revocation, it is conceived that the person entitled to revoke could not utilise this section against the banker (*k*). It might be different if the cheque were marked 'not negotiable'. By the reference back of repudiation in such cases, the payment might be regarded as having been made to a person who had no title, and the person entitled to revoke as having been, in law, true owner at the date of the payment (*l*).

Where a cheque has been stolen or obtained by fraud from the drawer and there is no one who has a better title as true owner, the drawer is true owner, though the terms of s. 79 (2)

(*h*) Cf. *post*, under that heading.

(*j*) (1875), 1 Q.B.D. 31; 3 Digest 241, 683.

(*k*) See as to 'void and voidable contracts', under that heading, *post*, p. 233.

(*l*) Cf. *Great Western Railway Co. v. London and County Banking Co., Ltd.*, [1901] A.C. 414; 3 Digest 239, 673.

seem hardly applicable (*m*). The drawer is not in a position to sustain any loss owing to the cheque having been paid contrary to the crossing, because the banker can never debit him with a cheque so paid, and so he loses nothing.

Banker cannot debit customer with cheque paid contrary to crossing

There are several grounds on which the inability of a banker to debit his customer with a crossed cheque paid in contravention of the crossing may be based. Payment contrary to the crossing is, apart from any statutory enactment, negligence on the part of the banker, and if loss ensues, the banker cannot charge the customer. In *Bellamy v. Marjoribanks* in 1852 (*n*), at which date there was no crossed cheques legislation in existence, the Court say :

"If the banker disregarded the custom, and paid the cheque to a private individual, that circumstance would be strong evidence against him in the event of his seeking to charge his customer with the payment, if the person actually presenting it was not the lawful holder and bearer of the cheque." (*o*)

The negligence is obviously greater at the present day in view of the statutory recognition and regulation of crossings. The element of loss consequent on the negligence is not specifically referred to in the above passage. If it is an essential, it seems supplied by the fact that the customer's liability for the debt, for which the cheque was given, revives if the cheque is paid to a person other than the creditor, contrary to the conditions on which it was accepted by him as discharge for the debt and to his loss. When the direct prohibition was in force, a creditor clearly only accepted a cheque in satisfaction on the condition that, if crossed, it was paid in accordance with the crossing ; and it is submitted that, notwithstanding the omission of the direct prohibition, the wording and obvious intention of the crossed cheques sections, and the invariable custom of bankers not knowingly to pay cheques contrary to the crossing, are sufficient to import the condition in every case in which a cheque is taken in payment.

Disobedience to mandate

The more potent reason is that payment in contravention of the crossing, in disobedience to the customer's mandate is an unauthorised payment with which the banker cannot debit the customer. This mandate of the customer appears independent of any direct prohibition in the Act. When the prohibition existed, no doubt it was embodied in the mandate ; the customer, when crossing the cheque, in effect said to the

(*m*) *Morison v. London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356 ; 3 Digest 242, 690.

(*n*) (1852), 7 Exch. 389 ; 3 Digest 240, 681.

(*o*) 7 Exch., at p. 404.

banker, "By crossing this cheque I not only exercise my personal authority over you as my agent, but put you under statutory obligation not to pay the cheque contrary to the crossing". The direct prohibition can no longer be invoked, save in the negligible case of the cheque wrongly crossed to more than one banker. But the personal authority remains. In the face of the crossed cheques sections and the universal practice of bankers, no banker could for a moment contend that he did not understand what his customer meant by crossing the cheque, or that it meant anything but what it did during the period the direct prohibition remained on the Statute Book. The customer does not do it to afford the banker protection under ss. 80 and 82 (*p*), but obviously for his own protection. See, on this point, the argument of the Attorney-General in *Aronowitz v. R.* (*q*). That case was settled and no judgment given. But the petitioner's contention that the crossed cheque, which he presented over the counter and which was refused payment on the ground of its being crossed, was thereby dishonoured, was obviously hopeless. It was not 'duly presented' within s. 47 (*r*).

Yet, in *Baines v. National Provincial Bank, Ltd.* (*s*), the Lord Chief Justice, LORD HEWART, decided in favour of the bank that their payment of a crossed cheque over the counter five minutes after the published closing hour was justified. He was considering purely the question of time and did not refer to the fact that the cheque was crossed, nor did the plaintiff raise the point.

Deputed mandate

And the mandate is none the less that of the customer if the crossing be put on or added to by a subsequent holder, provided it is done under the authority of and in accordance with the Act.

When the direct prohibition existed, the holder's power to put obligation or compulsion on the paying banker, with whom he was in no manner of privity, might be based on that direct prohibition. The holder was entitled to cross, the banker was forbidden to pay contrary to the crossing, by whomsoever lawfully put on. Indeed, in the 1876 Act, the power to cross was in terms conferred only on 'the lawful holder', the drawer's power being merely matter of inference. But, even while the direct prohibition existed, Courts referred the holder's power to impose restrictions and liabilities on the paying banker, not to the direct prohibition, but to a right derived from the customer, deputed by him by issuing the cheque subject to the holder's statutory power to cross, and in a

(*p*) 2 Halsbury's Statutes 75, 76.

(*q*) (1927), Times, November 18th and 19th.

(*r*) 2 Halsbury's Statutes 58.

(*s*) (1927), 96 L.J.K.B. 801; Digest Supp.

condition admitting the exercise of that power. In *Smith v. Union Bank of London* (t), decided in 1875, when the direct prohibition was in force, the Court say :

"What then is the effect of the statute in enabling the payee to cross the cheque? We think the answer is easy. It imposes caution at least on the bankers. But further, by its express words it alters the mandate, and the customer, the drawer, is entitled to object to being charged with it if paid contrary to his altered direction." (u)

And again :

"The drawers might refuse to be debited with it as having been paid contrary to their mandate as altered by the statute." (w)

Here the inability to charge the customer is distinctly based on the crossing by the holder under the power of the Act being tantamount to the actual mandate of the customer to his own agent, the banker.

In *Bobbett v. Pinkett* (y) the crossing was put on by the drawer himself. BRAMWELL, B., says, at p. 733 :

"The other difficulty in the defendant's way was that the cheque had across it the name of the London and County Bank, so that the defendant could only effectually present it through that bank. And if, as was the case, it was presented through another, the drawees might have refused to pay it, and, if they did pay, the plaintiff (the customer) might have refused to recognise that payment."

AMPHLETT, B., at p. 374, says :

"It cannot be denied that the crossing operated as a mandate to the drawees to pay the cheque to the bankers named, and to no one else, and that consequently the plaintiff might, if he was so minded, have declined to allow his account to be debited with the amount so paid contrary to his orders."

At the date of this case (1875) the direct prohibition was in force, but the Court refer the disability of the banker to debit the customer to disobedience of that customer's orders.

Payment to true owner

It is to be noticed that in *Smith v. Union Bank of London*, *ubi supra*, payment had been made to the true owner of the cheque. The Court state that, nevertheless, the banker could not charge the customer. The words used in *Bobbett v. Pinkett*, *ubi supra*, are equally applicable to such a case. As previously suggested, payment contrary to the crossing, even to the true owner, might possibly leave the customer still liable to the payee on the consideration ; but assuming breach of the mandate, direct or delegated, as of itself disentitling the banker to debit his customer, the rule would apply even when the banker had paid the payee himself, although such payee,

(t) (1875), 1 Q.B.D. 31 ; 3 Digest 241, 683.

(u) (1875), 1 Q.B.D., at p. 35.

(w) *Ibid.* at p. 36.

(y) (1876), 1 Ex. D. 368 ; 3 Digest 234, 650.

having actually received the money, could never take any steps against the drawer.

Such conclusion appears unreasonable and might conceivably be averted on the ground that the drawer, having received the benefit of the payment could not repudiate the transaction, a position for which there is considerable legal authority.

Proviso to s. 79 (z)

The proviso to s. 79 is difficult of interpretation owing to its involved and infelicitous language. It runs :

“ Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act . . . ”

The intention of the proviso is, presumably, to protect the banker who pays in conformity with the ostensible crossing or absence of crossing, from liability under the section to which it is the proviso. Reference to s. 78 (a), and the limitation of the protection in the proviso under the words ‘ by reason of ’, etc., show beyond question that it is the crossing, not the cheque, which is really the subject of the words ‘ have been added to or altered ’. SCRUTTON, L.J., expressed agreement with this view in *Slingsby v. District Bank, Ltd.* (b). As the proviso stands, the words ‘ or to have been added to or altered ’ applied primarily, if not exclusively, to the cheque rather than the crossing. The proviso ought to run thus :

“ Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to bear an addition to, or alteration of a crossing otherwise than as authorised by this Act . . . ”

A shorter form, following the terms of the protection, would be :

“ to have had a crossing which has been obliterated, or added to, or altered otherwise than as authorised by this Act . . . ” ;

but this does not grammatically include the case of a real crossing still existent, but unjustifiably added to or altered, and it would have been better if both the condition and the protection had been framed in more accurate terms.

The words in this proviso, ‘ nor shall the payment be questioned ’, are apparently designed to vindicate the banker’s right in such case to debit his customer, the previous words, ‘ shall not be responsible or incur any liability ’, providing his protection against the true owner. They are, however, susceptible of the meaning that the drawer’s liability on the

(z) 2 Halsbury’s Statutes 75. . (a) 2 Halsbury’s Statutes 75.

(b) [1932] 1 K.B. 544 ; Digest Supp.

cheque and the consideration are discharged, that the true owner cannot as against the drawer question the payment, having taken a security which he undertook or agreed should be treated as payment, if so dealt with ; the same position as with regard to an order cheque paid on forged indorsement. The latter seems, however, a somewhat forced construction.

Why differs from s. 77 (5) (c)

It is not so very clear why the language of s. 79, both in the body and the proviso, departs from that of s. 77 (5) in dealing with agents for collection. Section 77 provides that where a cheque is crossed specially the banker to whom it is crossed may again cross it specially to *another banker for collection*, the wording being altered from the previous '*to another banker, his agent for collection*'. Section 79 prohibits payment where a cheque is crossed specially to more than one banker, except where crossed *to an agent for collection being a banker* ; it makes the banker liable if he pays a cheque crossed specially otherwise than to the banker to whom it is crossed or *his agent for collection being a banker*, and the same term, '*his agent for collection being a banker*', is used at the end of the proviso and in s. 80 (d).

The change in s. 77 (5) must have been made with a purpose. Section 79, by harking back to the wording of the previous Act, seems to neutralise that purpose and require that the second banker must be the definite recognised agent for collection of the first and throw on the paying banker the burden of satisfying himself that such is the case. In most instances this would not be difficult, but there seems no reason why proximate and relative sections should be so devoid of uniformity.

Apparently no liability is incurred by the paying banker if he pay a cheque crossed specially to, say, one of the large stores which do a sort of banking business and by them specially to a clearing bank for collection. The first crossing is not to a 'banker', the second is an effectual special crossing by a holder.

Opening a crossing

It used to be common for a drawer to 'open the crossing', as it is termed, neutralising it by writing 'Pay cash', and initialling, and the practice received a certain amount of sanction from *Smith v. Union Bank of London* (e). But a banker acting on such opening would be liable to a true owner who had taken the cheque crossed, or had himself crossed it or added to the existing crossing, and who suffered loss by reason of the cheque being paid contrary to its then condition. When

(c) 2 Halsbury's Statutes 74.

(d) 2 Halsbury's Statutes 75.

(e) See at 1 Q.B.D., p. 35.

the drawer has once parted with the cheque, he cannot retract or neutralise his mandate to the prejudice of anyone who has taken the cheque on the faith of it, if and so far as then exercised, or has himself acted by virtue of the delegation of that mandate so far as then unexercised by the drawer or a previous holder. The suggested avoidance of the crossing in *Smith v. Union Bank of London*, *ubi supra*, is only contemplated as the result of joint action by the drawer and lawful holder.

Banker paying such cheque

Presumably the banker paying across the counter a cheque on which the crossing had been opened by his customer would be entitled to indemnity from the latter. But, if, as has happened, a fraudulent person writes 'Pay cash' and forges the drawer's initials, the banker is not protected or entitled to charge his customer if he pays the cheque over the counter. The crossing has not been obliterated, added to or altered within the meaning of the proviso to s. 79, where 'altered' clearly refers only to the substitution of one banker's name for that of another. On 7th November, 1912, the Committee of London Clearing Bankers passed a resolution in the following terms: "That no opening of cheques be recognised unless the full signature of the drawer be appended to the alteration, and then only when presented for payment by the drawer or his known agent". The general practice of English banks is more or less in accordance with this regulation, though the full signature is not always required.

Addition or alteration

These words in the proviso to s. 79, "to have been added to or altered otherwise than as authorised by this Act . . .", are adopted from s. 78. They must be taken to refer only to what would be effective additions or alterations if carried out under the authority of the Act. They would not include an addition which was merely in substance a memorandum, though locally incorporated with the regular crossing. 'Account payee', 'account A. B.', whatever their other effect, are not unlawful additions within this section (f).

Section 80 (g)

Section 80 is in the main a declaratory section so far as concerns the banker. It provides that where the banker on whom a crossed cheque is drawn pays it, in good faith and without negligence, in accordance with the crossing, he shall be entitled to the same rights, and be placed in the same position as if payment of the cheque had been made to the true owner thereof. It is little more than a reversed statement of the effect of s. 79.

(f) *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K.B., at p. 472; 3 Digest 240, 677.
(g) 2 Halsbury's Statutes 75.

The introduction of the words, 'in good faith and without negligence', precludes the utilisation of s. 80 for general protection where specific protection under other sections fails. If, for instance, a banker paid a crossed cheque in accordance with the crossing, but in some other respect not in the ordinary course of business, so as to lose the protection of s. 60 (*h*), the same fact would be held negligence, disentitling him to the benefit of s. 80.

Nor can this s. 80 be stretched to cover every case in which a banker pays what purports to be a crossed cheque in accordance with its ostensible crossing. It would not entitle a banker to debit his customer with a cheque to which that customer's signature as drawer was forged, although such document purported to be crossed. It might not be negligence in the banker not to detect the forgery if skilfully done, and the payment would be in good faith, but the document would not be a cheque drawn on him (*j*), and so would not come within these provisions. On the same principle, it would not entitle a banker to debit his customer with more than the original amount of a cheque which had been fraudulently raised, unless the customer had been guilty of negligence in the drawing thereof.

So, again, if a cheque cannot be a crossed cheque unless the crossing be put on by someone authorised under the Act, which seems arguable, this section would not protect the paying banker in the case of an ostensibly crossed cheque, on which the crossing had been put by an unauthorised person. But the banker, if paying in the usual course of business, would be protected either by s. 60 or as having duly paid a bearer cheque. The only way in which he could possibly be affected would be on the extreme doctrine enunciated in *Simmons v. Taylor* (*k*) that material alteration renders the cheque no longer the cheque of the customer. That doctrine must, however, probably be confined to cases where the alteration absolutely blots out the customer's mandate, which is not so in the case of an unauthorised crossing.

'Account payee'

With respect to cheques crossed 'account payee', or 'account A. B.', some little consideration is necessary.

As before stated, neither the transferability nor the negotiability of the cheque is limited by the addition of any such words to the crossing.

It may further be assumed that disregard on the part of the paying banker of any intimation conveyed by the words can give no direct remedy against him to the true owner, under s. 79. The cases in which such remedy accrues are limited

(*h*) 2 Halsbury's Statutes 66.

(*j*) See *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49; Digest 233, 646.

(*k*) (1858), 4 C.B.N.S. 463; 3 Digest 241, 682.

by that section, and include no reference to this unauthorised addition. There is no general term, such as 'in accordance with the crossing', in the section.

It may further be assumed that the drawer's mandate to his banker cannot be affected by the addition of such words as 'account payee' or 'account A. B.' by any holder.

The implied delegation of the drawer's authority, with respect to crossings, derived from the statute, extends only to crossings contemplated and authorised by the statute.

It is obviously impossible for the paying banker to see to the disposition of the proceeds in the hands of the collecting banker, and he fully discharges his duty when he pays in accordance with the crossing, apart from the unauthorised addition.

'Account payee' and subsequent indorsements

The only case which raises any question is that of an order cheque, crossed 'account payee', and bearing, when presented, indorsement subsequent to that of the payee, showing that it has been negotiated by him, and raising the inference that the proceeds will not go into his account. If it be assumed that the words 'account payee' were put on by the drawer, it might be contended that they formed part of his mandate to the banker; equivalent to his saying: "You are not to pay this cheque if, when it reaches you, it shows signs of having passed out of the possession of the payee".

But, as against this, there is the argument that the banker has no means whatever of knowing whether the words were put on by the drawer, by the payee himself, or by some other person, and further that the drawer, even if he himself put them on, has nevertheless issued an instrument negotiable *ad infinitum* by indorsement, with nothing which in law tends to limit that negotiability. So far, therefore, as disregard of the mandate is concerned, it would seem that the banker incurs no liability; the mandate, in any case, being contradictory and ambiguous, and the banker therefore entitled to act upon a reasonable construction of it. The only way the question could arise would be if one of the indorsements were forged. The true owner might then contend that the paying banker was not protected by s. 60, as not having paid the cheque 'in good faith and in the ordinary course of business', nor by s. 80, as not having paid it 'without negligence'; and the drawer might object to be debited on the same grounds.

The true owner is entitled to take advantage of the 'without negligence' exception, the duty to him being statutory, and a counterbalance to the protection afforded the banker by s. 80.

In *House Property Co. of London, Ltd. v. London County and Westminster Bank (I)*, ROWLATT, J., held that a crossed bearer

cheque with a named payee and marked 'account payee', was not collected without negligence under s. 82 if collected for another account, but such a cheque would obviously bear no indorsement, and therefore this does not touch the paying banker. Should the matter ever come up for decision, a Court would, in all probability, not be disposed to give much effect to an unauthorised addition of this sort, as against the paying banker; they would probably take the line that it constituted only a memorandum addressed to the collecting banker, its sole hitherto recognised function, and, if properly fortified by the evidence of bankers, would hold that the payment was not out of the ordinary course of business, and that the banker was therefore protected, both against his customer and the true owner, by s. 60, or by s. 80, inasmuch as no negligence was attributable to him (*m*).

The question is the less likely to arise in future owing to the now well-nigh general practice of bankers not to collect crossed cheques marked 'account payee' for any account other than that of the payee.

'Not negotiable'

A cheque bearing the words 'not negotiable' without one of the regular crossings is not a crossed cheque. The paying banker, therefore, cannot insist on its being presented through a banker, and incurs no liability under s. 79 by paying it over the counter. If such a cheque bear evidence of having been negotiated, he may either pay it or refuse payment. In the first case, he would justify his action on the ground that the words had no significance in face of 'order' or 'bearer', and that he could not tell by whom they were put on; in the second, on the ground that the cheque was contradictory, embarrassing, and irregular.

Revenue Act, 1883, s. 17 (*n*)

The extension of the crossed cheques sections, by s. 17 of the Revenue Act, 1883, to documents issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, raises an analogous point. The same section provides that it shall not be deemed to render any such document a negotiable instrument. As previously pointed out, this clearly means that such documents are not legally transferable, and the paying banker must be taken to know this.

If, therefore, he pays one of them which bears evidence of having been transferred, such as indorsement other than that of the payee by way of receipt or for collection, the banker

(*m*) Cf. *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K.B. 465; 3 Digest 240, 677.

(*n*) 16 Halsbury's Statutes 547.

might, although paying in accordance with the crossing, lose the protection of s. 80, on the ground of negligence.

Bills of Exchange Act (1882) Amendment Act, 1932

The crossed cheques sections have, by this statute, been further extended to apply to bankers' drafts as if they were cheques.

Dealing between two customers

When a crossed cheque drawn by one customer is paid in by another, the position is as follows. Either the bank is protected as having paid it to a banker, under s. 80 (o), or s. 79 (p) does not apply to such a case, and therefore the banker is protected, in case of forged indorsement of an order cheque, under s. 60 (q), in case of a bearer cheque, as having legally and properly paid it (r).

It has been suggested that this would not apply in all cases ; for instance, if negligence were found against the bank in the collection of the cheque, as in *Carpenters' Co. v. British Mutual Banking Co., Ltd.* (s). It is pointed out that the jury negatived negligence in this connection in the *Gordon Case*. It is argued that a bank is one entity, and that it cannot escape liability incurred in one capacity by setting up what might be a complete defence to an independent party (see again the *Carpenters' Co. Case* (s)). The argument would apply equally to this as to the case of a cheque paid in at one branch and paid at head office or another branch.

MARKING CHEQUES

At Instance of Customer

In this country, marking at the instance of the customer is rare. In 1920 the Committee of London Clearing Bankers resolved "That the practice of marking or certifying at the request of a customer his cheques or drafts upon a clearing bank be discontinued, and that if such a request be made, the banks should issue to their customer in exchange for his cheque either a draft on themselves or on the Bank of England".

At that time there were many banks which were not members of the Clearing House and to these the resolution would not apply. But the discouraging lead given by London had its influence elsewhere throughout the country, though marking for customers has not altogether died out. The object and effect of a banker's marking cheques at the instance of the customer has been stated by the Privy Council to be to further

(o) 2 Halsbury's Statutes 75.

(p) 2 Halsbury's Statutes 75.

(q) 2 Halsbury's Statutes 66.

(r) *Gordon v. London City and Midland Bank, Ltd.*, [1902] 1 K.B. 242, C.A.

(s) [1938] 1 K.B. 511 ; [1937] 3 All E.R. 811 ; Digest Supp.

the ready acceptance of the instrument by affording evidence on the face of it that it is drawn in good faith, and that there are funds sufficient and available to meet it, and as adding the credit of the drawee bank to that of the drawer (*Gaden v. Newfoundland Savings Bank* (ss); *Imperial Bank of Canada v. Bank of Hamilton* (i)).

But it must be remembered that both of these cases were appeals from colonies, where the law as to marking or certification of cheques is not the same as in this country (see an article, *Certification of Cheques*, in the "Journal of the Canadian Bankers' Association", vol. ix, p. 323).

It may be taken that the marking of a cheque at the instance of the customer does not, in this country, involve any direct or immediate liability on the part of the banker to the payee or any subsequent holder of the cheque. The marking does not possess the essential characteristics of an acceptance, required by the Bills of Exchange Act. In *Keenè v. Beard* (u) it was suggested that there was nothing to prevent a banker accepting a cheque if so disposed, but it is never done; and in any event, neither in form nor effect is marking an acceptance of which the payee or a holder can avail himself. This is supported by a Privy Council judgment delivered by LORD WRIGHT in *Bank of Baroda, Ltd. v. Punjab National Bank, Ltd.* (v), in which the English law and practice are closely treated. Nor does such marking, at the instance of the customer, render the bank liable to the payee or holder for money received to his use.

Liability of bank to holder

To constitute such liability several conditions must concur. First, the money sought to be recovered must have been actually received by the defendant, or something must have occurred which is equivalent to the receipt of money (*Prince v. Oriental Bank Corporation* (w)). In view of the fact that a cheque is not an assignment of any specific funds, and of the limited interpretation put upon the process of marking in the cases above quoted, it may be strongly doubted whether the request to mark, and the banker's compliance with that request, amount even to anything equivalent to the receipt of money for the specific purpose of meeting the cheque. But, assuming it does, the second condition must be fulfilled. There must be an acknowledgment to, if not a contract with, the specific person who is plaintiff in the action, that the money has been received for his use or is held at his disposal.

"There are many cases which establish that no action for money had and received will lie against a banker or agent in respect of funds which his principal has ordered him to pay to any person, at the suit

(ss) [1899] A.C. 281; 3 Digest 225, 591.

(i) [1903] A.C. 49; 3 Digest 233, 646.

(u) (1860), 8 C.B.N.S. 372; 6 Digest 10, 10.

(v) [1944] A.C. 176; [1944] 2 All E.R. 83; 2nd Digest Supp.

(w) (1878), 3 App. Cas., at p. 328; 3 Digest 230, 625.

of the person in whose favour the order is made, where the banker or agent has not assented to the order and communicated his assent to the plaintiff" (*per* TINDAL, C.J., in *Warwick v. Rogers* (x); see also *Malcolm v. Scott* (y); cf. *Greenhalgh (W. P.) & Sons v. Union Bank of Manchester* (z)).

The intimation, if any, conveyed by the marking of a cheque is far too vague and indeterminate to operate as such admission.

In so far as any representation is involved in the matter, it might be a question whether it were not made by the customer in handing over the cheque rather than by the banker in marking it. It might fairly be argued that the banker only certifies, as between himself and his customer, to an existing fact bearing on the state of accounts between them, viz., that the cheque is drawn in good faith, on funds at the time sufficient to meet it; much in the same way as a customer might get his bank book made up to date in order to afford evidence of the balance at his disposal. Following this, it might be contended that the representation to the payee or subsequent holder lies in the use made by the customer of the intimation conveyed by the marking, when he issues the cheque; as if at the same time he showed his pass book as evidence of the balance to his credit.

The stronger argument, however, is that the admission or acknowledgment, if any, is not made to any definite ascertained person, so as to qualify him for plaintiff in the action. The cheque may be negotiated by the payee; even if, at the time of marking, it purported to be payable to him only, it would still be within the power of the drawer to remove this restriction before issue. The case falls, therefore, altogether outside the principles above laid down.

Besides all this, there is the weighty consideration that if such effect were accorded to the marking of a cheque, it would make it tantamount to an acceptance by the banker, a character from which, as above stated, it is debarred.

It is therefore conceived that the expression 'adding the credit of the bank to that of the drawer', used by the Privy Council in the cases referred to, if applicable at all in English law, must not be understood to import any liability on the part of the banker to the holder of a marked cheque. There certainly appears to be no instance of a holder having recovered against a banker on a marked cheque in this country.

At instance of payee or holder

It would seem that in England the practice, common in America, of the payee or holder bringing a cheque to the drawee bank, not for payment, but to get it marked and getting it marked, is practically unknown. But if a marked cheque were brought to the bank by the payee or a holder, and the

(x) (1843), 5 Man. & G. 340, at p. 374.

(y) (1850), 5 Exch. 601; 1 Digest 675, 2858.

(z) [1924] 2 K.B. 153.

bank were to undertake to pay the specific person who brought it, or admit that they held the money for his use, such admission or promise would seem to be sufficient to bind the bank and obviate any difficulty arising from the want of appropriation of a definite sum to the cheque (see *Prince v. Oriental Bank Corporation* (a)).

Undoubtedly that is so, when the cheque is presented for payment, and, for some reason or other, marked by the bank instead of being paid (*Re Beaumont, Beaumont v. Ewbank* (b)).

As between banker and banker

As between banker and banker, where cheques received from customers by London clearing banks too late for presentation through the Clearing House on day of receipt are sent to the clearing bank on which they are drawn, and are marked, such marking has long been legally recognised as importing a promise or undertaking to pay, not analogous to acceptance, but based on custom.

"Besides this, a custom has grown up among bankers themselves of marking cheques as good for the purposes of clearance, by which they become bound to one another" (*Goodwin v. Roberts* (c)).

As early as 1810, in *Robson v. Bennett* (d), the court held that one banker rendered himself liable to another by marking a cheque presented after 4 p.m. No doubt that case proceeded partly on the basis of such marking being equivalent to acceptance, the rules as to which were then far laxer, admitting of even oral acceptance. But the custom has progressively grown and been recognised since then. The rules of the Bankers' Clearing House provide: "Marking a draft (for clearing purposes) to be considered equivalent to paying it".

Stopping marked cheques

The view among bankers is that the customer has no power to countermand payment of a cheque which a banker has marked at his request, and this is probably correct. True, the Bills of Exchange Act does not recognise, in sect. 75, any exception to the rule there laid down that the authority of a banker to pay a cheque is determined by countermand of payment; and it might happen that between the date of the marking of the cheque and the countermand, and before presentation, the customer became aware of some fraud or other circumstance which, but for the marking, would fully justify him in stopping the cheque. It is also true that an order to a banker to pay money is executory and revocable until something definite has been done by the banker binding him to the person to be benefited, as by crediting him or admitting that he holds the

(a) (1878), 3 App. Cas., at p. 331; 3 Digest 230, 625.

(b) [1902] 1 Ch. 889, at p. 895; 6 Digest 10, 14.

(c) (1875), L.R. 10 Exch. 337, at p. 351; 17 Digest 7, 31.

(d) (1810), 2 Taunt. 388; 6 Digest 60, 473.

money to his use (*Gibson v. Minet* (e)). But, as against this, it may be said that, though the banker has incurred no direct legal liability to the payee or holder, he has, at the request and for the benefit of the customer, undertaken a moral and professional obligation, founded on recognised custom, towards any other banker who may present the cheque for payment. If so, the banker is in the position of an agent whose agency is coupled with an interest, or at least in as strong a position as the betting agent in *Read v. Anderson* (f) (cf. *Robson v. Bennett* (g)). The most reasonable effect to be attributed to it is that it binds the drawee banker to any other banker into whose hands the cheque may come. He could hardly refuse payment of a cheque he had marked, if it was presented by or through another banker, who might have altered his position in reliance on the promise or undertaking implied from the marking.

It is submitted that this is sufficient to preclude the customer from withdrawing the authority and stopping payment of the cheque to the detriment of the banker.

The customer could not be heard to say he did not know of the object of the marking, inasmuch as he got the cheque marked in order to obtain the benefit of the banker's support. Nor would it make any difference that the cheque was an open one and might never pass into another banker's hands; because if refused payment when presented by the payee or holder, it would be open to him to present again through a banker. The case for the banker would naturally be even stronger if the cheque were a crossed one when marked.

One reason assigned by bankers why a cheque marked by a banker at the request of a customer cannot be stopped is that having been so marked and debited to the customer, it has technically been paid. This is not so. Where, as in the cases above referred to, the cheque is presented for payment and marked instead of paid, the transaction may be treated in the light of constructive payment; where the cheque is marked at the instance of the customer, before issue, and to further the negotiation of the instrument, this has no analogy to payment, actual or constructive.

Cheque presented for payment and marked

In the cases referred to above, namely,

(1) Where a cheque is presented for payment and marked for payment next day;

(2) Where as between banker and banker it is presented too late for clearing and either marked or the paying banker gives his own cheque,

the customer cannot countermand payment. There is here a

(e) (1824), 2 Bing. 7; 3 Digest 230, 626.

(f) (1884), 13 Q.B.D. 779; 1 Digest 372, 798.

(g) (1810), 2 Taunt. 388; 6 Digest 60, 473.

complete appropriation to a definite individual ; the proceeding is in the ordinary course of business, which the drawer must be taken to have contemplated ; or it may be regarded as a constructive payment sufficient to determine the customer's right of revocation, as being tantamount to payment before countermand (*Gibson v. Minet* (h) ; *Re Beaumont, Beaumont v. Ewbank* (j)). Again, the customer bargains not to leave the banker liable for anything done in the ordinary course of his business, which would be the case here if he could revoke (cf. *Read v. Anderson* (k)).

Where a cheque is marked at the request of the drawer, the banker is justified in retaining funds to meet it, and, if necessary, in dishonouring cheques which would reduce the credit balance below the amount. For how long he should continue this course does not appear to have been settled. In Scotland a week is regarded as a reasonable period. A cheque, even when marked, is intended for speedy presentation, not as a continuing security.

(h) (1824), 2 Bing. 7 ; 3 Digest 230, 626.

(j) [1902] 1 Ch. 889, at p. 895 ; 6 Digest 10, 14.

(k) (1884), 13 Q.B.D., at p. 783.

CHAPTER 14

CONVERSION—MONEY HAD AND RECEIVED. VOID AND VOIDABLE INSTRUMENTS

Conversion defined

A conversion is a wrongful interference with goods, as by taking, using or destroying them, inconsistent with the owner's right of possession. To constitute this injury, there must be some act of the defendant repudiating the owner's right, or some exercise of dominion inconsistent with it (a).

Intention is no element in conversion.

"Any person who, however innocently, obtains possession of goods the property of another who has been fraudulently deprived of the possession of them, and disposes of them, whether for his own benefit or that of another person, is guilty of a conversion." (b)

In *Edelstein v. Schuler & Co. (c)*, BIGHAM, J., held that a broker who sold securities for a thief was not liable in conversion, mainly on the ground that as the securities were negotiable, the purchaser would acquire a good title. The authority seems a doubtful one.

A bill, note, or cheque, or the paper it is written on, is 'goods' within the above definition. Where it is a negotiable instrument, the damages are its face value (d). Even in the case of a non-negotiable instrument, it would seem that the person who has obtained money by means of it is estopped from alleging that its value is not the amount he has obtained by its means (e).

When action maintainable

It is to this action that, subject to statutory protection, a banker is liable who—

(a) pays a cheque on a forged indorsement (f);

(a) *Bullen and Leake*, 5th ed., p. 382.

(b) *Bullen and Leake*, *ubi supra*. *Hollins v. Fowler* (1875), L.R. 7 H.L., at p. 795; 1 Digest 684, 2940; *Clayton v. Le Roy*, [1911] 2 K.B. 1031; 43 Digest 493, 314; *Morison v. London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356; 3 Digest 242, 690; *Underwood (A.L.), Ltd. v. Bank of Liverpool*, [1924] 1 K.B. 775; Digest Supp., *per* SCRUTTON, L.J.

(c) [1902] 2 K.B. 144; 43 Digest 470, 98.

(d) *Morison v. London County and Westminster Bank, Ltd.*, *ubi supra*.

(e) See *Bavins, Junr. and Sims v. London and South Western Bank*, [1900] 1 Q.B. 270; 6 Digest 107, 738; *Morison v. London County and Westminster Bank, Ltd.*, *ubi supra*, *Fine Art Society, Ltd. v. Union Bank of London* (1886), 17 Q.B.D. 705; 43 Digest 483, 204.

(f) *Smith v. Union Bank of London* (1875), L.R. 10 Q.B. 293, 295; affirmed, 1 Q.B.D., at p. 35; 3 Digest 241, 683.

- (b) collects a bill, note, or cheque with a forged indorsement, or to which the customer has no title (*g*) ;
- (c) pays a bill accepted payable at his bank to a person who holds it under a forged indorsement. In this case there is, of course, no statutory protection, even if the bill were one payable on demand, inasmuch as it is not drawn on the banker ;
- (d) delivers goods entrusted to him for safe custody to the wrong person (*h*) ;
- (e) takes as holder for value a bill or cheque with a forged indorsement ; or a cheque marked 'not negotiable', to which the title is void or defective (*j*).

In all cases involving payment of money, the liability for conversion is quite independent of any question of the right to debit the customer. The banker may be liable in conversion, and disentitled to debit his customer at the same time, and so stand to lose the money twice.

Who may sue for conversion: The true owner

The person to whom this remedy is given, or against whom the banker is protected, is termed in the Bills of Exchange Act 'the true owner', but no definition is given in the Act. The term constantly occurs in judgments also, but again without definition. The matter is complicated by this : where a cheque or bill has been wrongfully taken or detained from a man, or dealt with in a manner inconsistent with his rights, and prejudicial to him, his only remedy is, clumsily enough, by an action for conversion, trover, or detinue of the paper on which the cheque or bill is written (*k*). There is no other form of action available but this, and this form of action is confined to dealings with chattels. But the chattel part of a negotiable instrument, while it brings it within the range of conversion, is the subordinate element of its entity. The contractual part, of which the chattel is merely evidence, involving as it does negotiability, governs the passing of the property in and right of possession to the piece of paper, and may divert or suspend both of them to quarters or in ways which would be impossible in the case

(*g*) *E.g.*, *Bissell & Co. v. Fox Brothers & Co.* (1885), 53 L.T. 193 ; 3 Digest 238, 666 ; *Kleinwort, Sons & Co. v. Comptoir National d'Escompte de Paris*, [1894] 2 Q.B. 157 ; 3 Digest 242, 691 ; *Great Western Railway Co. v. London and County Banking Co., Ltd.*, [1899] 2 Q.B. 172 ; reversed, [1901] A.C. 414 ; 6 Digest 442, 2842 ; *Capital and Counties Bank, Ltd. v. Gordon*, [1903] A.C. 240 ; 3 Digest 239, 670 ; *Underwood (A. L.), Ltd. v. Bank of Liverpool*, [1924] 1 K.B. 775 ; Digest Supp. ; *Midland Bank, Ltd. v. Reckitt*, [1933] A.C. 1 ; Digest Supp. ; *Lloyds Bank, Ltd. v. Savory (E. B.) & Co.*, [1933] A.C. 201 ; Digest Supp.

(*h*) See 'Valuables for Safe Custody'.

(*i*) *Great Western Railway Co. v. London and County Banking Co., Ltd.*, [1901] A.C. 414 ; 3 Digest 239, 673 ; *Capital and Counties Bank, Ltd. v. Gordon*, [1903] A.C. 240 ; 3 Digest 239, 670.

(*k*) See *Morison v. London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356 ; 3 Digest 242, 690, per READING, L.C.J. ; *Lloyds Bank, Ltd. v. Chartered Bank of India, Australia and China*, [1929] 1 K.B. 40 ; 33 Com. Cas. 306 ; Digest Supp.

of anything which was a mere chattel without any contractual element, such as a horse or a book. In *Smith v. Union Bank of London* (l), a cheque become payable to bearer was stolen and negotiated to a holder in due course. It was held that he, and not the person from whom it was stolen, was the 'true owner'. So, on the other hand, a forged indorsement or the 'not negotiable' crossing may preclude the passing of the property in the paper in circumstances otherwise sufficient to transfer it. If a cheque is wrongfully issued by an agent authorised to draw it for specific purposes, the principal remains the owner (m).

Possibly the addition of the otherwise superfluous word 'true' in the descriptive title 'true owner', is designed to point this. For the 'true owner', in the sense of the person who can support conversion for a bill, note, or cheque, is the person who, taking into consideration the provisions of the Bills of Exchange Act, and recognising that the negotiable character of the instrument overrides the mere property in the chattel, is on that basis entitled to the property in and possession of the piece of paper.

Principal and Agent

A difficulty arises in the case of a bill or cheque made payable to an agent in his own name or under his official designation, but for moneys due to and intended to be received by his principal. Take the case of a cheque sent for rates or Inland Revenue duties to the rate or tax collector, and made payable to him personally either by name or description. Who is the true owner of such cheque, the agent or his principal? In *Great Western Railway Co. v. London and County Banking Co., Ltd.* (n), a cheque was made payable to Huggins or order, he being a rate collector, in payment of rates falsely represented by him to be due from the Great Western Railway. LORD HALSBURY, L.C., said, at p. 418 :

"In this case it cannot be pretended that Huggins had any title to it at all."

LORD DAVEY says (p. 419) :

"I am of opinion that Huggins never had any property in the cheque, which was handed to him only as the collector and agent of the overseers in payment of a debt alleged to be due to them. The appellants never intended to vest any property in him for his own benefit, but the property in the cheque was intended to be passed to his employers, the overseers, notwithstanding that it was made payable to Huggins' order. Huggins therefore had no real title to the cheque."

That case, however, is far from conclusive. The plaintiffs, the appellants, were the railway company, the drawers of the

(l) (1875), 1 Q.B.D. 31 ; 3 Digest 241, 683.

(m) *Morison v. London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 364, 375 ; 3 Digest 242, 690 ; *Lloyds Bank, Ltd. v. Savory (E. B.) & Co.*, [1933] A.C. 201 ; Digest Supp.

(n) [1901] A.C. 414 ; 3 Digest 239, 673.

cheque, not the overseers for whose benefit it was intended. Inasmuch as there was really nothing due to the latter, the case was exceptional as regards them, and they might well not be true owners. The decision only goes to the fact that, in the particular circumstances, the drawers remained true owners as in *Morison's Case*. Where the cheque was made payable to a man under his official denomination and for a debt really due to his superiors, the Court would probably hold that such superiors were true owners, and that anyone dealing with such a cheque had notice of their rights. If such a cheque were for government purposes, the exceptional rights of the Crown might afford further ground for making the banker or other person who had received the money refund it (o). If the cheque was payable to such agent in his private capacity, the superiors might still be true owners, but there would be nothing on the face of the cheque negating the agent's personal title; with a banker collecting it crossed, it would be a question of negligence; with a transferee, of *bona fides*, unless crossed 'not negotiable'.

After-acquired title

It is generally laid down in stating the position requisite for a plaintiff in conversion, that he must be entitled to the property in and possession of the chattel at the date of the conversion (p).

It has been said that a man cannot sue for conversion by virtue of a subsequently acquired title to the chattel converted. In *Bristol and West of England Bank v. Midland Railway Co.* (q), the question was dealt with by the Court of Appeal, and the previous authorities reviewed. The Court held that when the rightful owner demanded the goods, refusal, of itself, constituted a conversion; that it was no answer to the demand to say that the goods had been parted with prior to the accrual of that owner's title, if the parting with them was a wrongful act against the person to whose title the plaintiff had subsequently succeeded (r).

But the case must be distinguished from those where the goods have in the interim been parted with, not wrongfully, but rightfully, as by delivery by a person having a revocable title, before revocation or notice thereof, or have been dealt with on his behalf during the same period. It is abundantly clear that no conversion will lie for such acts either at the suit of the original owner or anyone deriving title from him.

And this latter principle will probably be found to exclude

(o) See *Re West London Commercial Bank* (1888), 38 Ch. D. 364; 16 Digest 222, 121.

(p) See *White v. Teal* (1840), 12 Ad. & El., at p. 115; 43 Digest 516, 534.

(q) [1891] 2 Q.B. 653; 43 Digest 500, 397.

(r) Cf. *London Joint Stock Bank, Ltd. v. British Amsterdam Maritime Agency, Ltd.* (1910), 104 L.T. 143; 16 Com. Cas. 102; 41 Digest 393, 2357.

the former one in all cases connected with bills, notes, and cheques, by reason of their negotiable character and the governing element of contract involved in them.

When the property in a bill passes: Void and voidable contracts

If a bill, note, or cheque is delivered as a contract, the property in the chattel passes, it may be only temporarily, if the contract is revocable; if there is no contract, the property never passes. Whether there is a contract or not depends on the existence or absence of a contracting mind. Where there is a contract, then the result of that contract and its negotiable incidents is, that third persons may acquire rights which subsequent revocation will not be permitted to prejudice or affect.

The distinction is almost invariably brought forward by and in cases of fraud.

A man is induced by false representations as to the nature of the document, or by the substitution of one document for another, to put his hand to what is in form a negotiable instrument. There is no contracting mind, the document is null and void; and the property in, and right to possession of, the chattel, the piece of paper, remain absolutely vested in the person deceived (s). As BUCKLEY, L.J., said in *Carlisle and Cumberland Banking Co. v. Bragg* (t):

“The true way of ascertaining whether a deed is a man’s deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. If . . . he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case, it is not his deed.”

It has been sought to import the element of negligence as estoppel in this connection (u). This might hold good as between customer and banker, where the fraud resulted in the drawing of a cheque. In no other case can there be a duty to anyone, consequently no negligence.

A man is fraudulently deceived into issuing a negotiable instrument in favour of one specific person in the belief that he is another specific person: an essential element of contract is lacking, and the results are the same (w).

A man is induced by fraud to execute and issue a negotiable instrument, knowing its character, and there being no substitution of one specific person for another. The contract is not void, but voidable. The property and right of possession in

(s) *Foster v. Mackinnon* (1869), L.R. 4 C.P. 704; 6 Digest 166, 1053; *Lewis v. Clay* (1897), 67 L.J.Q.B. 224; 6 Digest 166, 1054.

(t) [1911] 1 K.B. 489; 17 Digest 235, 501.

(u) *Carlisle and Cumberland Banking Co. v. Bragg*, *ubi supra*.

(w) *Cundy v. Lindsay* (1878), 3 App. Cas. 459; 35 Digest 98, 72; *Tate v. Wills and Dorset Bank* (1899), “Journal of Institute of Bankers”, vol. xx, p. 376; 3 Digest 240, 679.

and to the chattel are divested ; but, on repudiation of the contract, revert to the defrauded person, subject to any right acquired by third parties in the interval (y).

The distinction is, as suggested by LORD PENZANCE in *Cundy v. Lindsay* (z), between a man who, being deceived, enters into no contract, and a man who, being also deceived, does enter into a contract. The doctrine of this case was held distinctly applicable to negotiable instruments by LORD DAVEY, in *Great Western Railway Co. v. London and County Banking Co., Ltd.* (a), and by the Court in *Tate v. Wilts and Dorset Bank, ubi supra*.

Rights of third parties

The rights of third parties which hold good against subsequent repudiation of a voidable contract, and preclude the action of conversion, are of various kinds and degrees.

Of course, a holder in due course of a bill, cheque or note, which he has taken in the interval, is fully protected (b). But a smaller right in the instrument than that of a holder in due course would seem to be sufficient. In *Tate v. Wilts and Dorset Bank* (c), CHANNELL, J., says :

" I take it the bankers were the holders of the cheque (whether they were holders for value does not matter), and that they got payment of it in the regular way. It is admitted if that was so there was a fresh disposition of the cheque, and that thereupon the transaction could not be avoided so as to make the bank liable, . . ."

This case appears to have been doubted in *Lloyds Bank, Ltd. v. Chartered Bank of India, Australia and China* (d), but not overruled.

Fresh disposition

'Fresh disposition' is a very wide term, and would cover almost any legitimate dealing with a negotiable instrument. As exemplified in this case of *Tate v. Wilts and Dorset Bank*, the doctrine protects the banker who has collected an uncrossed cheque for a customer, where that customer holds it under a voidable title. It would be a pity if it had to be abandoned.

Voidable contracts and the 'not negotiable' crossing

But no rights countervailing repudiation of a voidable

(y) *Clutton v. Attenborough & Son*, [1897] A.C. 90 ; 3 Digest 238, 667 ; *Tate v. Wilts and Dorset Bank* (1899), "Journal of Institute of Bankers", vol. xx, p. 376 ; 3 Digest 240, 679 ; cf. *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q.B. 643 ; 39 Digest 519, 1352 ; *Whitehorn Brothers v. Davison*, [1911] 1 K.B. 463 ; 39 Digest 535, 1458.

(z) (1878), 3 App. Cas. 459, at p. 461 ; 35 Digest 98, 72.

(a) [1901] A.C. 414 ; 3 Digest 239, 673.

(b) *Clutton v. Attenborough & Son*, [1897] A.C. 90 ; 3 Digest 238, 667.

(c) (1899), "Journal of Institute of Bankers", vol. xx, p. 376, "Legal Decisions Affecting Bankers," vol. i, at p. 290 ; 3 Digest 240, 679.

(d) [1929] 1 K.B. 40 ; 33 Com. Cas. 306 ; Digest Supp.

contract can be acquired through a cheque marked 'not negotiable', except where statute affords protection.

The effect of such marking is to put each holder on precisely the same footing. On repudiation or revocation of a voidable contract affecting such cheque, the title of the true owner relates back to the date of the fraud or other circumstance which entitles him to repudiate. Every person who has taken or dealt with the cheque does so on the basis that his position is subject to possible revocation, and can therefore set up no rights acquired during the interval, either to the cheque or its proceeds (e). Any one of the successive holders could be sued for conversion, it being no defence that he has parted with the article converted. The document stands on a lower level than an ordinary chattel, to which an innocent third party can acquire a good title by purchase from one who holds it under a voidable contract (f). And, in questions of conversion, the liability of an agent being dependent on the title of his principal, it would follow that any person dealing with the cheque, as a banker in collecting it, would on revocation be liable in conversion to the true owner, unless protected by s. 82 of the Bills of Exchange Act (g).

MONEY HAD AND RECEIVED

Wherever conversion lies, and money has been received for the goods or negotiable instrument converted, the true owner is entitled to waive the wrong and sue for money had and received to his use (h). The claims are usually joined in the alternative, and this is the form in which the action is couched against, for instance, a banker who has collected a cheque with a forged indorsement.

This form of pleading has always been treated as really alternative in effect, the joinder of a claim for money had and received not operating as a waiver of the wrong so as in any way to prejudice the claim in conversion, but leaving the plaintiff free to recover on either ground, and defences appropriate to each being open to the defendant (i). As exemplified in that and many other cases, it is the conversion claim which is far the more dangerous for bankers. The action for money had and received is, however, not merely an alternative to conversion, or dependent on the existence of a conversion; it is an independent and widespread form of action, and lies in

(e) *Great Western Railway Co. v. London and County Banking Co., Ltd.*, [1901] A.C. 414; 3 Digest 239, 673; *Morison v. London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356, at p. 375; 3 Digest 242, 690.

(f) *White v. Garden* (1851), 10 C.B. 919; 39 Digest 533, 1447.

(g) 2 Halsbury's Statutes 76.

(h) For what amounts to a waiver, see *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1; [1940] 4 All E.R. 20; 2nd Digest Supp.

(i) See, for instance, *Morison v. London County and Westminster Bank, Ltd.*, *ubi supra*.

many cases where conversion would not. The *dictum* of the Privy Council in *John v. Dodwell & Co.* (j) that, "The action for money had and received is, according to the law of England, in its nature one of assumpsit, founded on implied or imputed contract and depends on a waiver of any tort committed, and on the correlative affirmance of a contractual relation", if and in so far as it avers dependence on the existence and waiver of a tort, is probably incorrect. But for the fiction of loan to the banker, a customer's claim to moneys received by the banker on his account would be for money had and received.

It is, at the present day, the most difficult of all actions to define or dogmatise about.

In *Sinclair v. Brougham* (k), LORD SUMNER said it was hard to reduce to one common formula the conditions under which the law will imply a promise to repay money received to the plaintiff's use, and the remark is equally true of other aspects of the question. The outcome of the whole matter, as deducible from the judgments in *Sinclair v. Brougham*, would seem to be, as indicated in the *dictum* of LORD SUMNER, above quoted, that the action lies where, from the circumstances, the law will imply or impute a promise to repay by the defendant. It may be a mere fiction of law which supplies the promise, and it cannot be implied where, as in *Sinclair v. Brougham*, it would, if actually made, be *ultra vires*. As to when the promise will be implied is, as LORD SUMNER says, hard to formulate. The old idea was that the action was an importation of principles of equity into common law, and that the money was recoverable where it was unconscientious, *contra aequum et bonum*, for the defendant to retain it as against the plaintiff. LORD SUMNER says, at p. 456 :

"There is now no ground left for suggesting as a recognisable 'equity' the right to recover money *in personam* merely because it would be the right and fair thing that it should be refunded to the payer."

See also the judgment of the Court of Appeal in *Holt v. Markham* (l). Another doctrine was that the action was founded on a quasi-contract growing out of the principle of unjust enrichment ; that a man could not retain a mere wind-fall at the expense of another (m). That appears somewhat obsolete and far-fetched, a view which is supported by LORD WRIGHT in his *Legal Essays and Addresses* (n), at p. 20 of which he says :

"But there seem to me to be many reasons why references to the fictional contract should now be eliminated even on

(j) [1918] A.C., at p. 570 ; 43 Digest 535, 705.

(k) [1914] A.C., at p. 453 ; 3 Digest 159, 231.

(l) [1923] 1 K.B. 504 ; 21 Digest 305, 1111.

(m) See *Sinclair v. Brougham*, per LORD HALDANE (referring to Professor Ames of Harvard University), at p. 417.

(n) Cambridge University Press, 1939.

grounds of history. The fiction of the contract implied in law was adopted for procedural reasons of convenience which were quite sufficient while the old forms of action continued. . . .” And again, at p. 24 : “The property concept has superseded the implied contract concept, as I think it did throughout *Sinclair v. Brougham*, when the form of action had receded out of sight.”

In *Sinclair v. Brougham*, at p. 433, LORD DUNEDIN comes near to saying that apart from waiver of an existing tort, the range of money had and received is pretty well limited to money paid by mistake. That seems to exclude cases where the action clearly would lie, e.g., money received by an agent for his principal.

Apart from plain cases like that, a solution of the difficulty will probably be found in the application of the principle of following the money, evolved in *Sinclair v. Brougham* ; *John v. Dodwell & Co.*, *ubi supra*, and *Reckitt v. Barnett, Pembroke and Slater, Ltd.* (o), and analogous to the ‘tracing order’ procedure. See *ante*, ‘Following money of wrongdoer’.

Position of an agent

As to money paid by mistake, see under that heading, *post*.

The position of an agent with regard to money had and received for his principal calls for some notice.

If his agency has involved him in a conversion he is liable for the conversion ; the plaintiff can rely on that and need not resort to any claim for money had and received (p).

Where an agent has not been concerned in conversion, and is sued for money had and received (q), his position would seem to be that it cannot be recovered against him if he received it in good faith and materially altered his position, as by paying it over to his principal before it was claimed, strengthened, in the case of a collecting banker, by the fact that he received it on a negotiable instrument, see *per* PHILLIMORE, L.J., in *Morison's Case*. But, as in that case, cases against bankers have almost always been decided on the conversion claim.

In fitting circumstances the distinction between a void and voidable contract affecting a cheque or bill might influence the position of the agent. There being no conversion by the dealing with a voidable instrument pending repudiation, the true owner can only recover money received upon it by the agent and parted with during the interval, if the position of the agent from whom he claims would not be prejudiced by his having to repay.

(o) [1929] A.C. 176 ; Digest Supp.

(p) *Morison v. London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356 ; 3 Digest 242, 690, the case of a banker collecting a crossed cheque to which customer had no title.

(q) As in *Transvaal and Delagoa Bay Investment Co., Ltd. v. Atkinson*, [1944] 1 All E.R. 579 ; 2nd Digest Supp.

On this principle, a banker is protected if he has collected a cheque or bill for one who has a voidable title to it, and has paid the money over, without the means of recovering it, before he has received notice of revocation (*r*). In this case the fact that the bank had credited the customer's account with the proceeds of the cheque, and that amounts had been drawn out which, on the ordinary system of appropriation, exhausted those proceeds, was held not to preclude the true owner from recovering as money had and received, inasmuch as the state of the account was such as admitted of the bank debiting the amount to the customer, and therefore the bank were not, in fact, prejudiced, and had not irrevocably altered their position.

Question of negligence

In some cases it seems to have been suggested that negligence might deprive the agent of the protection above referred to ; but it will be noticed that in *Bavins, Junr. and Sims v. London and South Western Bank*, the Court of Appeal found that the bank had acted negligently, and yet were prepared to extend to them the protection, had the facts warranted or necessitated it.

(*r*) See *Bavins, Junr. and Sims v. London and South Western Bank*, [1900] 1 Q.B. 270 ; 3 Digest 243, 693.

CHAPTER 15

MONEY PAID BY MISTAKE

SUMMARY—

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As already stated, the law as to money had and received, analogous to money paid by mistake, is in a somewhat unsettled and indefinable condition. The old tests of whether it was unfair or inequitable that the payer should recover it or the payee keep it, the deductions from Roman law, the theory of unearned increment, are no longer to be depended on ; and it is only when one comes to money paid under mistake of fact that there is any solid foundation to work on.

To make money paid by mistake recoverable, certain conditions must exist.

Mistake of fact

The mistake must be one of fact, not general law, but the construction of a private document or even a private Act of Parliament has, in equity, been regarded as mistake of fact rather than law. In *Kleinwort, Sons & Co. v. Dunlop Rubber Co. (a)*, acting on a general instruction in ignorance of a special one affecting the case was treated by the House of Lords as a mistake of fact.

In *Sinclair v. Brougham (b)*, LORD DUNEDIN said :

“ The familiar case is the paying of money by A. to B. under the mistaken impression in fact that a debt was due, when in truth there was no debt due.”

It might be said that whether a debt was due or not was not a pure question of fact. In *Holt v. Markham (c)*, misapplication or misconstruction of certain War Office orders, having regard to the special circumstances of the case, was held by the Court of Appeal not to be a mistake of fact. The better view according to the later cases is that the mistake must be one of real fact. On a question of mixed fact and law, WRIGHT, J., held that the money was not recoverable unless the plaintiff showed that it was the mistake of fact which caused

(a) (1907), 97 L.T. 263 ; 35 Digest 156, 530.

(b) [1914] A.C. at p. 431.

(c) [1923] 1 K.B. 504 ; 35 Digest 157, 533.

him to make the payment. *Home and Colonial Insurance Co., Ltd. v. London Guarantee and Accident Co., Ltd.* (d).

Between the parties

The mistake must be as to some matter between the party paying and the party receiving. It is not sufficient that the party paying should be under a misapprehension as to some fact, and that, but for that misapprehension, he would not have paid the money; the mistake must touch the actual transaction. See mistake of fact distinguished from condition by LORD SHAW: "... condition has reference to the future, whereas a mistake in fact has relation to the past" (e). In *Chambers v. Miller* (f), a bank paid a cheque on presentation, but immediately afterwards discovered that the customer, the drawer, had no assets to meet it. It was held that the payment was irrevocable and the money not recoverable, on the ground that the mistake was not between the bank and the person who received payment, but between the bank and their own customer (g).

Mistake of fact is mistake of fact on the part of the payer; it is not directly material whether the recipient was alike mistaken. If the latter's knowledge rendered the receipt fraudulent, he could not retain the money. So, also, partial knowledge, or even inexcusable neglect of means of knowledge, might possibly afford a counter-estoppel to that set up on alleged alteration of position (h).

This case of *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd.*, has done much to consolidate the law of payment under mistake of fact and to enunciate its privileges and limitations. It is unfortunate that the judgment is of a narrow majority, three to two, though the decision of the two dissentients seems to be based solely on estoppel. The facts were that one Bodenham had purchased goods from W. & G. on the hire-purchase system, and was indebted to them in £5000. He falsely told Jones that he, B., was agent of a firm of motor manufacturers who were putting on the market a new car, and he persuaded Jones to sign an agreement by the motor firm appointing Jones agent for the sale of the car on the terms that Jones was to purchase 500 cars and pay £5000 deposit. Jones hesitated to pay this sum to an unknown person or firm. B. falsely said W. & G. were financing the firm and were his principals and suggested that the £5000 should be paid to them. Certain cheques were sent to W. & G. which were returned, and ultimately a cheque for £5000 was sent by Jones through B. to W. & G., who there-

(d) (1928), 45 T.L.R. 134; Digest Supp.

(e) *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd.*, [1926] A.C. 670; 35 Digest 149, 470.

(f) (1862), 13 C.B.N.S. 125; 35 Digest 148, 467.

(g) Cf. *Aitken v. Short* (1856), 1 H. & N. 210, at p. 215; 35 Digest 148, 461.

(h) Cf. *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd.*, *ubi supra*.

upon returned to B. the furniture they had seized under the hire-purchase agreement. The judgments reaffirm the decision in *Kelly v. Solari (i)*, that neither negligence nor neglect of means of knowledge on the part of the payer affords any defence to the action.

The minority in the House of Lords (VISCOUNT CAVE, L.C., and LORD ATKINSON) seem to have been influenced by the case of *Watson v. Russell (j)*, in which a cheque was entrusted to an agent on a condition not disclosed to the recipient, and the money paid him on the cheque was held not recoverable. But, as pointed out by LORD SHAW, in the case before the House there was no question of mandate or agency, a condition is not a matter of fact. Waring & Gillow being payees could not be holders in due course; no question of negotiability arose. He said it was just as if, under mistake of fact, Jones had sent 5000 sovereigns by messenger. *Watson v. Russell* was, in substance, the common case of a cheque handed over, but not to be issued or transferred except in accordance with agreement, and issued to an innocent third party contrary to that agreement.

As in *Kleinwort, Sons & Co. v. Dunlop Rubber Co. (k)*, the fact that the £5000 was paid to Waring & Gillow by cheque, and the money received by them on that cheque, was otherwise immaterial, and its recovery does not impugn the doctrine dealt with hereafter as to money paid on a negotiable instrument not being recoverable if the party receiving it has altered his position. That doctrine only applies where the mistake of fact is as to the instrument itself, forged indorsement or the like. That is all that the exigencies of negotiability require; the causes which led to the issue of the instrument are remote and irrelevant. In *Kleinwort's Case* and in *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd.*, the cheque itself was a perfectly good cheque.

There was not much question as to the mistake of fact in *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd.* LORD SHAW said the payment was under mistake of fact induced by Bodenham's "tissue of lies". LORD SUMNER said the cheque was issued to discharge an obligation and no obligation existed. Nor could Waring & Gillow, having obviously been paid as principals, claim any immunity accorded to agents. The real question, therefore, was whether Waring & Gillow were entitled to keep the money by reason of having altered their position. LORD CAVE, L.C. [minority], said:

"... there is a great body of authority . . . that where a person to whom money has been paid by mistake has been misled by the payer's conduct and on the faith of that conduct has acted to his own detriment, the payer cannot in law . . . insist on repayment."

(i) (1841), 9 M. & W. 54; 35 Digest 151, 487.

(j) (1864), 5 B. & S. 968; 6 Digest 130, 868.

(k) (1907), 97 L.T. 263; 35 Digest 156, 530.

And he quotes LORD LOREBURN, L.C., in *Kleinwort's Case*, *ubi supra*, where he said :

"It is indisputable that if money is paid under a mistake of fact and is re-demanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid, in whatever character it was received."

LORD SUMNER, referring to this definition of LORD CAVE's, said that Waring & Gillow did not alter their position in reliance on anything that Jones did. Jones was not responsible for anything Bodenham did or said. The words "on the faith of . . . has acted" used by LORD CAVE might mean only 'acting in the belief' or 'because of', and more than that was wanted for estoppel. As to the quotation from LORD LOREBURN, LORD SUMNER said :

" . . . the *Kramrisch Cases* (*Continental Caoutchouc and Gutta Percha Co. v. Kleinwort, Sons & Co. (I)* and *Kleinwort, Sons & Co. v. Dunlop Rubber Co. (II)*), particularly Lord Loreburn's proposition in 97 L.T., at p. 264, and *Kerrison v. Glyn, Mills, Currie & Co. (m)*, all refer to the defence to a claim for money paid under a mistake of fact which an agent may set up if before discovery of the mistake he has paid it over to the principal for whom he received it, but, as at present advised, I do not think they go further on the question of estoppel."

The return of the furniture seems to have been regarded as sufficient detrimental alteration of position. Presumably there was no prospect of Waring & Gillow's getting it back again from Bodenham.

It may be noted that LORD LOREBURN's proposition does not purport to deal with the question of alteration of position, nor does he affirm that a principal can, merely by having altered his position, claim to retain the money. LORD SUMNER, though with some hesitation, confines the protection of having altered position to an agent paying over to his principal, holding that to set up estoppel a principal must show some more definite act or representation on the part of the payer than the mere payment of the money.

The principle, or supposed principle, of *Lickbarrow v. Mason (n)*, as to which of two innocent parties ought to bear the loss, had been put forward on behalf of Waring & Gillow. LORD SUMNER says :

"The broad principle of *Lickbarrow v. Mason* only applies where there is a duty between the parties; where one of two innocent parties has to suffer, the one to do so is one by whose neglect it has arisen; neglect must be in the transaction, the proximate cause of leading the other party into the mistake, and must be the neglect of some duty owing to that person or the public of whom that person is one,"

citing in support of this proposition LORD BLACKBURN in *Swan*

(I) (1904), 90 L.T. 474; 3 Digest 179, 332.

(II) (1907), 97 L.T. 263; 35 Digest 156, 530.

(m) (1911), 81 L.J.K.B. 465; 3 Digest 170, 282.

(n) (1794), 5 Term Rep. 683; 41 Digest 384, 2292.

v. North British Australasian Co. (nn) and LORD PARMOOR in *London Joint Stock Bank, Ltd. v. Macmillan and Arthur (o)*. And he specifies the correct application of the principle as justifying, if not the ground of, the decision in bank cases such as *Skyring v. Greenwood (oo)* and *Holt v. Markham (p)*, where payments were made as to a principal. In such cases, he said,

“the payers are under an obligation to inform the payee of the true state of his account, and, disregarding this obligation, pay him more than he was entitled to. The payment is then at their risk and they must stand by it.”

The cases of *Kleinwort, Sons and Co. v. Dunlop Rubber Co.* and *Kerrison v. Glyn, Mills, Currie & Co.*, referred to by LORD SUMNER, are dealt with hereafter under the heading ‘When received as an Agent’.

The first and main proposition derivable from *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd.* is that money paid to a man as principal, not agent, under mistake of fact can be recovered against him, although he has detrimentally altered his position, if he did so merely in consequence of the payment and not in reliance on some independent act or representation of the payer’s or by reason of some breach of duty on the payer’s part, or unless the mistake of fact directly touches a negotiable instrument by virtue of which he received the money, and his position has been or might have been prejudiced in the interval between payment and reclamation.

SECTION 1.—PAYMENT ON NEGOTIABLE INSTRUMENTS

As pointed out by LORD SUMNER, mistake of fact in relation to negotiable instruments must be as to the instrument itself, not as to some collateral or extrinsic fact which led to its issue. Formerly the dealing with this question was hampered by the divergent views of MATHEW, J., in *London and River Plate Bank v. Bank of Liverpool (pp)*, and of the Privy Council in *Imperial Bank of Canada v. Bank of Hamilton (q)*. Briefly stated, the gist of the decision in the former case was that money paid on a negotiable instrument to an innocent person could not be recovered if he had had the money in his possession for such a period that his financial position might, not necessarily would, be affected if he had to refund. The attitude taken up by the Privy Council was that the money could be recovered unless the recipient, by lapse of time, had lost his remedy against some

(nn) (1863), 2 H. & C. 175 ; 6 Digest 451, 2887.

(o) [1918] A.C. 777 ; 3 Digest 233, 644.

(oo) (1825), 4 B. & C. 281 ; 1 Digest 441, 1311.

(p) [1923] 1 K.B. 504 ; 21 Digest 305, 1111.

(pp) [1896] 1 Q.B. 7 ; 6 Digest 107, 737.

(q) [1903] A.C. 49 ; 35 Digest 152, 494.

previous party by being deprived of the opportunity of giving notice of dishonour.

The author always had a strong predilection for the former point of view, supported as it was by *Cocks v. Masterman* (qq) and other sound authorities. *Cocks v. Masterman* enunciated the sound principle that the holder of a bill is entitled to know, on the day when it becomes due, whether it is an honoured or a dishonoured bill, and that if he receives the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. So in *Mather v. Maidstone* (Lord) (r), JERVIS, C.J., said :

“As a general rule, the holder of a bill of exchange has a right to know whether or not it has been duly honoured by the acceptor at maturity, and when the bill is presented, if the acceptor pays it, the money cannot be recovered back if the acceptor has the means of satisfying himself of his liability to pay it, though it should turn out that the acceptance was a forgery.”

In this same case, when it was suggested that the person who had been paid would not be prejudiced if he had to refund, CRESSWELL, J., said,

“The law does not permit any inquiry as to that in the case of negotiable instruments ; and it is highly expedient that that should be so.”

That is really the key to the whole situation. Certainty is the essence of negotiability, which could not exist without it. To MATHEW, J., is due the credit of having first fully expounded it in terms carrying conviction alike to lawyers and business men.

London and River Plate Bank Case

In the much criticised case of *London and River Plate Bank v. Bank of Liverpool* (rr), now recognised as the leading authority, MATHEW, J., lays down the law to be derived from *Cocks v. Masterman* in terms even broader than the general proposition contained in that judgment. He held that the ruling principle was not negligence or the banker's knowledge or means of knowledge, but the right of a holder of a bill on the due date to an immediate and conclusive answer as to its fate ; which is an element essential to the negotiability of the instrument and imperatively demanded by the exigencies of business.

In the *London and River Plate Bank Case* a bill drawn in Monte Video on the plaintiffs in London, on which indorsements were forged, was presented by, and paid by them to, the defendants on 19th August, 1893 ; some months later the forgeries were discovered and the action brought to recover the money as paid under a mistake of fact. MATHEW, J., held it

(qq) (1829), 9 B. & C. 902 ; 6 Digest 107, 734.

(r) (1856), 18 C.B. 273, at p. 294 ; 6 Digest 126, 842.

(rr) [1896] 1 Q.B. 7 ; 6 Digest 107, 737.

was not recoverable, and gave judgment for the defendants. It was agreed that there was no evidence of negligence on the part of the plaintiffs and that the defendants had acted throughout in perfect good faith.

After reviewing the cases prior to *Cocks v. Masterman* and expressing his opinion that the question of negligence was not, and could not be, the foundation of the judgment in any of them, MATHEW, J., proceeds :

“ In *Cocks v. Masterman* the simple rule was laid down in clear language for the first time that, when a bill becomes due and is presented for payment, the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at once, it may be the money can be recovered back ; but if it be not, and the money is paid in good faith and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indispensable for the conduct of business. A holder of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own, and if he is subsequently sought to be made responsible to hand it back. It may be that no legal right may be compromised by reason of the payment. For instance, the acceptor may pay the bill and discover on the same day that the bill is a forgery, and so inform the holder of it, so that the holder would have time to give notice of dishonour to the other parties to the bill ; but even in such a case it is manifest that the position of a man of business may be most seriously compromised, even by the delay of a day. Now that clear rule is one that ought not to be tampered with. It is one of the few rules of business which is perfectly clear and distinct at present, and, as it seems to me, is unimpeachable.”

Bearing of judgment

In the plainest terms this judgment lays down that, where the payment is on a negotiable instrument, neither the loss of the opportunity of giving notice of dishonour nor any actual prejudice or damage to the innocent holder is necessary to entitle him to keep the money. If he has had the money for such interval that his position may have, not necessarily has, been affected, he can keep it. The judgment further strongly discountenances the view that the banker's duty to know his customer's signature or negligence on the banker's part was the true principle of any of the earlier decisions, and demonstrates the unreasonableness of holding a banker bound to detect a clever forgery of even his own customer's signature.

Imperial Bank of Canada v. Bank of Hamilton

In 1902 the case of *Imperial Bank of Canada v. Bank of Hamilton* (s) came before the Privy Council. In that case one Bauer drew a cheque for five dollars on the Bank of Hamilton, leaving a considerable space after the word ‘ five ’. He got it marked by the Bank of Hamilton and then wrote in the word ‘ hundred ’ after the ‘ five ’. He took the altered cheque to

(s) [1903] A.C. 49 ; 3 Digest 233, 646.

the Imperial Bank of Canada, opened an account with it, and forthwith drew out the amount by cheques. The Bank of Hamilton paid the altered amount to the Imperial Bank of Canada on the morning of 27th January, 1897. The Bank of Hamilton discovered the fraud the next morning, and immediately gave notice to the Imperial Bank of Canada, demanding repayment of 495 dollars. The Privy Council held that the money was recoverable, affirming the decision of the Canadian courts.

After stating that the Imperial Bank was not in fact prejudiced in any way by want of notice on the day of payment, the Privy Council say that it appeared to them that the stringent rule laid down in *Cocks v. Masterman* did not really apply to the case, and proceed :

"The cheque, as drawn and certified, *i.e.*, for five dollars, was never dishonoured, and no question arises as to that. The cheque for the larger amount was a simple forgery ; and Bauer, the drawer and forger, was not entitled to any notice of its dishonour by non-payment. There were no indorsers to whom notice of dishonour had to be given. The law as to the necessity of giving notice of dishonour has therefore no application. The rule laid down in *Cocks v. Masterman*, and recently reasserted in even wider language by MATHEW, J., in *London and River Plate Bank v. Bank of Liverpool*, has reference to negotiable instruments on the dishonour of which notice has to be given to someone, . . . who would be discharged from liability unless such notice were given in proper time. Their Lordships are not aware of any authority for applying so stringent a rule to any other cases. Assuming it to be as stringent as is alleged in such cases as those above described, their Lordships are not prepared to extend it to other cases where notice of the mistake is given in reasonable time and no loss has been occasioned by the delay in giving it."

The judgment had previously recognised the rule as laid down in *Cocks v. Masterman*, so far as relates to really negotiable instruments. It is the subsequent doubt and the reference to notice of dishonour which raise questions. In so far as this particular decision conflicts with the judgment of MATHEW, J., it has lost any authority it may have had. The Court of Appeal in *Morison v. London County and Westminster Bank, Ltd.* (ss), recognised and acted on the soundness of the judgments in *Cocks v. Masterman* and the *London and River Plate Bank Case*, ignoring the reservations put thereon by the Privy Council. PHILLIMORE, L.J., is the only one who refers to the *Imperial Bank of Canada Case*, and as he couples it with *Cocks v. Masterman* and the *London and River Plate Bank Case*, it is clear that he only cites it for such propositions as are common to all three cases. LORD READING's judgment is apparently somewhat self-contradictory, but anyway he refers to the *London and River Plate Bank Case*, not the *Imperial Bank of Canada* one.

Notice of dishonour test

One objection to adopting the test suggested in this latter

case, the loss of opportunity of giving notice of dishonour, has always been that it is hard to conceive any case of payment by mistake where such opportunity would be lost. Even MATHEW, J., appears to think that time for notice, were it material, would run from the date of payment. One hesitates before questioning a proposition backed by such authority ; at the same time, there were rules of law existing before the Bills of Exchange Act, and there are now provisions in that Act, which one might otherwise have thought applied to this situation, and reserved to the holder the right to give notice at a later date, even as late as that when the money was reclaimed. It is clear the holder could not give notice of dishonour when the bill was paid. Payment is not dishonour. As GIBBS, C.J., said in *Smith v. Mercer* (t) :

“ The defendants, while the bill continued paid, could not have given notice to the indorser, for the bill was not dishonoured.”

If, then, there is any dishonour of which notice has to be given, it would seem as if it took place when the money was reclaimed rather than when it was paid, and that the notice might effectively be given then.

Delay in giving notice might be excused

But if, by some process of relation back, the dishonour be regarded as occurring on the date of presentation and payment, s. 50, sub-s. (1) of the Bills of Exchange Act provides as follows :

“ Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence.”

The sub-section appears distinctly calculated to cover the case of a person who has received payment of a bill or cheque on presentation, and remained in total ignorance of anything to affect his rights until the money is reclaimed on the ground of forgery or mistake. The delay is caused by circumstances beyond his control, and there is no default, misconduct, or negligence on his part to which the delay is referable.

If this view be accepted, the curious result follows that, according to the test laid down by the Privy Council in the *Imperial Bank of Canada Case*, and their interpretation of the earlier authorities, there could be no condition of circumstances precluding the bank or other payer from recovering the money paid on a forgery ; as the right to give notice would never be lost unless it were by the fault of the person paid, in not giving it within a reasonable time after notice of the mistake and claim.

(t) (1815), 6 Taunt. 76, at p. 86 ; 6 Digest 107, 733.

No doubt the position of prior parties might have altered meanwhile, and the remedy against them prove not so effective, but they would not be discharged for want of notice, and that is the only test laid down by the Privy Council. Moreover, as CRESSWELL, J., said in *Mather v. Maidstone (Lord) (u)*, with regard to the alteration of position of prior parties :

“The law does not permit any inquiry as to that, in the case of negotiable instruments, and it is highly expedient that that should be so.”

No doubt that was said in answer to a contention that the holder was not injured by being deprived of the opportunity of giving notice, but it would seem equally applicable where the notice, though delayed, was given in time according to law.

Result if this be so

If the above argument is well founded, it makes the result of the *Imperial Bank of Canada Case* and that of the *London and River Plate Bank Case* pretty much the same ; the latter is the more logical and has been approved by the Court of Appeal, so it may henceforth be treated as the true exposition of the law.

A mistake of fact which is between the parties may support an action for money had and received although the party paying had means of knowledge of the real facts, of which he did not avail himself, provided he pay honestly (v).

Where the person receiving the money receives it with knowledge of the facts or *mala fide*, it can, of course, be recovered from him (w).

Forged signatures

The existence of a forged signature, whether that of drawer, acceptor or indorser, on a bill or cheque, is a mistake of fact, immediately touching the bill or cheque, between the person who pays and the person who presents the instrument and receives payment in ignorance of the defect (x). Both parties believe the document to be authentic in all respects ; whereas it may in some cases not be a negotiable instrument at all, while in others a material element, supposed genuine, is only a sham.

Negotiability and its exigencies being the root of the matter, the principles above set forth must be confined to cases where

(u) (1856), 18 C.B. 273, at p. 294 ; 6 Digest 126, 842.

(v) *Kelly v. Solar* (1841), 9 M. & W. 54, at p. 58 ; 35 Digest 151, 487 ; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49, at p. 56 ; 35 Digest 152, 494 ; *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd.*, *ubi supra*.

(w) *Kendal v. Wood* (1870), L.R. 6 Exch. 243 ; 35 Digest 155, 523.

(x) *Cocks v. Masterman* (1829), 9 B. & C. 902 ; 6 Digest 107, 734 ; *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q.B. 7 ; 6 Digest 107, 737 ; *Imperial Bank of Canada v. Bank of Hamilton*, *supra*.

the payment is made on an instrument possessing, at least in some degree, the character of negotiability. That is clearly deducible from all the authorities.

One must rule out documents on which all the operative signatures are, or the only operative signature is, forged, such as a cheque on which the drawer's ostensible signature is a forgery and on which there is no genuine indorsement. If the cheque in the *Imperial Bank of Canada Case* was, *quoad* the raised amount, not a negotiable instrument, but a mere sham, as the Privy Council held, a cheque on which the only professing operative signature is forged cannot be a negotiable instrument, but must be a sham *in toto*.

In the same way, LORD HALSBURY, speaking of the documents in *Bank of England v. Vagliano Brothers* (y), said :

"I have designedly avoided calling these documents bills of exchange. They were nothing of the sort."

It cannot be suggested that the exigencies of negotiability require that a bogus instrument should be treated as a real one for any possible purpose. That would be as much contrary to reason and public policy as to hold a man entitled to retain the change he had, possibly innocently, obtained for a counterfeit sovereign.

In *Morison's Case* the cheques were drawn *per pro.* by a person having authority so to draw for his principal's purposes, but actually so drawn fraudulently and for his own benefit. They were held not forgeries within the Forgery Act, 1861. Whether under the 1913 Act, as interpreted in *Kreditbank Kassel G.m.b.H. v. Schenkers* (z), or under the Criminal Justice Act, 1925, s. 35, sub-s. (1) (a), the same view would obtain, might be a question. See *post*, 'Forgeries'.

Instruments become negotiable

But a document, sham in its inception, may, by the addition of a genuine operative signature, become a negotiable instrument, at any rate by estoppel. A document is fairly termed a negotiable instrument when a person, or a succession of persons, can acquire rights upon it, independent of previous forgeries or equities. A genuine acceptance of a forged drawing ; a genuine indorsement where either drawing, acceptance, or prior indorsement was, or all of them were, forged ; a genuine indorsement of a cheque with a forged drawing : any of these would give a person taking the document in good faith and for value a remedy on it against such acceptor or indorser. Such remedy may be only by estoppel ; s. 55 (b) precludes any acceptor or indorser from denying to a subsequent holder in due course the genuineness of any previous signature, in the

(y) [1891] A.C. 107.

(a) 11 Halsbury's Statutes 417.

(z) [1927] 1 K.B. 826 ; Digest Supp.

(b) 2 Halsbury's Statutes 64.

case of indorsers, the validity of the bill, and imposes liability to such holder in due course. The words of the section, 'The acceptor of a bill', 'The indorser of a bill', indicate that, at least as against such signatories, the document, whatever its previous status, is a bill, a negotiable instrument. In *Price v. Neal* (c), the drawer's signature was forged on a bill. It was accepted and paid to an indorsee. The acceptor sued the indorsee for the money, but failed.

In the *London and River Plate Bank Case*, MATHEW, J., referring to that case, said :

"It seems to me the principle underlying the decision is this, that if the plaintiff in that case so conducted himself as to lead the holder of the bill to believe that he considered the signature genuine, he could not afterwards withdraw from that position, and no single case has been produced in which, where payment has been made on a forged indorsement to the holder of it in good faith, the money has been recovered back."

MATHEW, J., does not treat *Price v. Neal* as based solely on the estoppel of the acceptor ; if he regards it as supporting his doctrine of exigencies of negotiability, it shows that a sham instrument may become negotiable by one added signature. The same might be deduced from the references, in the *Imperial Bank of Canada Case*, to the absence of indorsees. That seems to imply that if it had been once genuinely indorsed, the cheque, sham as it was, would have come within the rules applicable to negotiable instruments, whatever those rules might be. Again, MATHEW, J., implies that the protection is not founded on any position of holder ; the payee's indorsement was forged in the *London and River Plate Bank Case*. Where there is any anterior forged indorsement, a man is not holder of the real or whole bill, but only a technical holder by estoppel against those precluded from disputing his title ; where there is only one indorsement and that forged, he is not a holder at all. But when paid, he holds the money as having been paid him on a negotiable instrument, not on any claim as holder.

The extension to the collecting banker by the *Morison Case* of the benefit of this doctrine of the exigencies of negotiability is a valuable concession. It might well have been argued that the principle could only be invoked by one who took the instrument as holder in the strict commercial sense, the foundation and justification of the rule being the upholding the credit and circulation of a recognised medium of mercantile exchange, and securing its acceptance as part of the currency. But the Court expressly base the protection of the collecting bank, acting as agent, on the ground that they had been paid on a negotiable instrument and altered their position by paying the money to the customer before it was reclaimed ; deliberately preferring this line of defence to the equally available one of the agent

who has innocently received money and paid it away to his principal before it is sought to recover it from him. BUCKLEY, L.J., said :

“The fact is that after these proceedings Morison, whose fault or misfortune it is that he has employed a dishonest agent, is seeking to throw the consequences of his dishonesty upon the persons who are not in any way responsible for that dishonesty, persons who dealt with the cheques in the ordinary course of business and, as is admitted, in perfect good faith. The principle of *Cocks v. Masterman* and of *London and River Plate Bank v. Bank of Liverpool* is, I think, applicable. The principle is larger than that in *Holland v. Russell* (cc). It is, I think, the case that the bank are not here to be treated simply as agents who paid money to Abbott as their principal before the bank received notice not to pay it. The money here has been received by the defendants in good faith and paid to their customer, Abbott, in good faith. Since its receipt they have altogether altered their position in that they have in good faith paid the money away to Abbott. Under these circumstances I think the principle of *Cocks v. Masterman* applies and that the defendants cannot be rendered liable for it to Morison.”

It should be noticed that LORD READING expressly, BUCKLEY, L.J., impliedly, hold that the protection to the collecting bank enures against the drawer of the cheque or customer of the paying bank as well as against the paying bank itself. PHILLIMORE, L.J., apparently takes the same view, but his language is slightly ambiguous.

Mere transfer by delivery of an instrument professedly payable to bearer, but really only a sham, would not import a negotiable character to it (d).

Payment on forgery of customer's signature

Assuming then that a mere sham is not a negotiable instrument and that payment thereon can in ordinary cases be recovered as money paid under mistake of fact, the question has been asked whether there is an exception where the payment is made by a banker, accepting a forgery as his customer's signature. The question is not likely to arise in practical form. There would either be some indorsement on the instrument, bringing it within the general rule, or it would have been presented by the fraudulent party, who would not, even if found, be worth proceeding against.

The only case one can conceive is that of a bearer cheque with drawer's name forged or a 'self or order' cheque with drawer's name and indorsement forged, passed to an innocent person, and paid to him by the drawee bank. Of course there is no protection to the banker in either case. The article is not a bill or cheque, it is not drawn on a banker ; s. 60 does not apply, nor does s. 80 (e). There could be no effective crossing. If paid in to a banker for collection, that banker's customer

(cc) (1863), 4 B. & S. 14 ; 29 Digest 300, 2469.

(d) See Bills of Exchange Act, s. 58 (3) ; 2 Halsbury's Statutes 65.

(e) 2 Halsbury's Statutes 66, 75.

would still be the proper person to be sued ; if taken for value, that banker might be sued (*f*). The improbability of the paying bankers' tracing the person they paid, if they paid over the counter, reduces the hypothetical case to one where the instrument is presented through a bank. Assume this state of affairs. Does the fact that the banker has paid the document on the forged signature of his customer preclude him from recovering the money from the innocent payee or his banker ?

Question of negligence

It would be idle to deny that, in well-nigh all the earlier cases, judges do talk about the banker being bound to know his customer's signature, and about negligence on the banker's part as precluding recovery. The judgment of MATHEW, J., has sometimes been read as laying down that negligence had nothing whatever to do with the question. That is hardly so. His lordship declined to recognise it as the ruling principle of any of the previous cases, as was contended on behalf of the plaintiff bank. The case was one of forged indorsement, as to which no duty of recognition could be alleged, and it was admitted the plaintiff bank had not been negligent. In all the previous cases, as in the one before him, the document had possessed some negotiability ; and MATHEW, J., held that the real ground of those earlier decisions was the same as that of his own, namely, the maintenance of negotiability.

That would reduce the expressions of the earlier judges, as to duty and negligence on the banker's part, to *obiter dicta* ; but they are so strong and numerous that they cannot be altogether ignored.

Banker and customer's signature

It is a common phrase that a banker is bound to know his customer's signature ; but it is a misleading and an inaccurate statement. There can be no such legal obligation. The real position is that if the banker pays away his customer's money in reliance on a signature being his customer's, which is not so, he cannot charge the customer with that payment. Even if it were a duty to know the customer's signature, it could only be a duty to the customer ; it could not possibly extend to third persons, such as the payee of a cheque. So with the suggested negligence : there is no duty to the payee or holder to take care, and without such a duty there can in law be no negligence.

There would not appear in any of the earlier cases to have been any definite finding by a jury of negligence against the banker. The term is invariably used, by those judges who employ it, in close connection with the supposed duty of the banker to know his customer's signature.

The supposed negligence really seems the outcome of

(*f*) See *London and River Plate Bank Case*,

defective evolution. The duty of the banker to know the customer's signature is assumed. There is no indication of the stages by which that absolute duty is transformed into a duty to take care, and the correlative right to have care taken transferred from the customer to the payee or holder. There is nothing to show the breach of that duty. As MATHEW, J., pointed out, if the forgery was cleverly executed, the banker might not be able, by any amount of care, to ascertain whether the signature was or was not a forgery. So the breach is assumed or its necessity ignored; and the failure of the banker to fulfil his supposed absolute duty to his customer to know that customer's signature finally emerges in the form of a breach of duty to a third person to take care, in other words, negligence of which that third person is entitled to avail himself.

It is of course conceivable that there might be cases of real carelessness on the part of the banker. The signature might present glaring difference from the customer's ordinary one. In such a case it might be suggested that though, by reason of the absence of duty, there was no negligence in the legal sense, there was a recklessness, a departure from ordinary business habits, which, in a contest between two innocent parties, made it unreasonable that the money should be recovered from the man who was absolutely powerless to prevent the loss by the one who ought to have done so (g). On the general question, BAYLEY, J., in *East India Co. v. Tritton* (h), might be quoted :

"The most favourable view of this case for the plaintiffs is to say that both parties are innocent and free from blame: but even then the maxim, '*Potior est conditio possidentis*', applies",

cited with approval in *Guaranty Trust Co. of New York v. Hannay & Co.* (j); and the unqualified statements by BRAMWELL, B., in *Hart v. Frontino and Bolivia South American Gold Mining Co., Ltd.* (k), and LINDLEY, J., in *Simm v. Anglo-American Telegraph Co.* (l), as to a banker paying on a forged cheque not being able to recover the money (m).

On the other hand, there is the authority of *Kelly v. Solari* (n), that neglect of means of knowledge does not prevent recovery if the payment was made honestly, and that case was cited as apposite in the *Imperial Bank of Canada Case* and

(g) Cf. the remarks in *Jacobs v. Morris*, [1902] 1 Ch. 816, at p. 833; 6 Digest 110, 761, as to the effect of a disregard of business habits in precluding a man from recovering money he has paid by mistake.

(h) (1824), 3 B. & C., at p. 289; 3 Digest 207, 484.

(j) [1918] 2 K.B. 623; 6 Digest 161, 1037.

(k) (1870), L.R. 5 Exch. 111, at p. 115; 9 Digest 288, 1785.

(l) (1879), 5 Q.B.D. 188, at p. 196; 9 Digest 288, 1787.

(m) Cf. VAUGHAN WILLIAMS, L.J., in the C.A., in *Sheffield Corporation v. Barclay*, [1903] 2 K.B. 596.

(n) (1841), 9 M. & W. 54, at p. 58; 35 Digest 151, 487.

approved in *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd. (o)*. It was at one time suggested that the money might be recoverable on the ground that the person presenting the bill or cheque for payment ought to be held to warrant its genuineness and his own right to receive payment. The Bills of Exchange Act affords no countenance to any theory of a warranty between holder and drawee; indeed, the whole of that idea was demolished in *Guaranty Trust Co. of New York v. Hannay & Co., ubi supra*; and the banker's position is not such as to justify the assertion of a warranty or right of indemnity on the lines of *Sheffield Corporation v. Barclay (p)*. In any case, the allegation by the banker of such a warranty in respect of his customer's own signature would be somewhat audacious.

Probable view of a Court

What view a Court would take were the question directly before them must be doubtful. Unquestionably they would reject the idea of a banker's supposed duty to know his customer's signature affording any defence to a third party. But it is conceivable that, if they found that there had been real carelessness or neglect of ordinary business precautions on the part of the bank, not merely mistake or omission to resort to sources of information, they might hold that this turned the scale. There would have been ample ground for so holding when the old theories of the equitable basis of money had and received were in force.

And there is always present the idea that in some way or another, possibly on the basis of representation implied by payment, stated by MATHEW, J., in the *London and River Plate Bank Case* to be the *ratio decidendi* in *Price v. Neal*, a Court would be astute to debar a banker from recovering money he had paid an innocent person on a forgery of his own customer's signature.

SECTION 2.—WHEN RECEIVED AS AN AGENT

The other position barring the recovery of money paid under mistake of fact is where it has been innocently received by an agent, and that agent, before notice of the mistake, has paid it over to his principal, or otherwise materially and irrevocably altered his position.

It has to be borne in mind that the parties concerned where money is claimed as paid under mistake of fact are the person who has paid it and the person who has directly received it. The interests of third parties, say, the banker's customer, do not come into the matter at all.

(o) [1926] A.C. 670; 35 Digest 149, 470.

(p) [1905] A.C. 392; 3 Digest 276, 882. See again *Guaranty Trust Co. of New York v. Hannay & Co.*

In *Admiralty Commissioners v. National Provincial and Union Bank of England, Ltd. (q)*, money was paid into the bank to a customer's account under mistake of fact. The bank refused to refund it without the consent of the representatives of the customer, he being dead. The bank contended that it had incurred an obligation to honour cheques to the amount of the payment in, which absolved them from any liability to repay, citing the *Joachimson v. Swiss Bank Corporation (qq)* as supporting this contention. But the plea was unsuccessful, SARGANT, J., saying that the *Joachimson Case* only dealt with the normal conditions of banker and customer, and that the undertaking to honour cheques did not extend to amounts standing to the credit of current account if and in so far as it was swollen by an inadvertent payment in mistake of fact.

So, on the other hand, the banker cannot set up lien, overdraft or set-off, which he could otherwise claim against his own customer, even where the money has been paid in to him as agent for that customer. Lien only extends to the property of the customer, which money paid in by mistake of fact is not; set-off only applies to debts between the same two parties; continuance of an overdraft is not sufficient change of position.

The whole learning on the matter is comprised in three cases in the House of Lords: *Kleinwort, Sons & Co. v. Dunlop Rubber Co. (r)*, *Kerrison v. Glyn, Mills, Currie & Co. (s)*, and *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd. (t)*. In the first case, the facts were somewhat complicated. Dunlops had received from one Brandt notice that one Kramrisch had assigned to him £3000 which Dunlops owed Kramrisch. Kramrisch had in fact equitably assigned this to Brandt. Kramrisch also directed Dunlops to pay the money to Brandt. Dunlops had a previous general order from Kramrisch to pay moneys due to him to Kleinworts, as they were financing him in various transactions; they were not doing so in the particular one which involved this £3000. Through a mistake of some of their officials, Dunlops, acting on the general, not the particular, order, paid the £3000 to Kleinworts by cheque, presumably for Kramrisch's account. Brandt sued Dunlops for the assigned debt, and under the judgment of the House of Lords (u) recovered judgment for the £3000. Dunlops then sued Kleinworts for the £3000 paid to them as having been paid by mistake of fact. At the time Kleinworts received

(q) (1922), 127 L.T. 452; Digest Supp.

(qq) [1921] 3 K.B. 110.

(r) (1907), 97 L.T. 263; 1 Digest 678, 2888.

(s) (1911), 81 L.J.K.B. 465; 1 Digest 670, 2888.

(t) [1926] A.C. 670; 35 Digest 149, 470.

(u) *Brandt's (William) Sons & Co. v. Dunlop Rubber Co.*, [1905] A.C. 454; 8 Digest 445, 208.

the money they had allowed Kramrisch to exceed an agreed overdraft of £100,000 he had with them. They placed the £3000 to the credit of his account and continued it for some time longer, making further advances. The jury were asked, "Were Kleinworts led by Dunlops' mistake to alter their position with regard to Kramrisch to their own disadvantage?" Answer, "No".

The House of Lords affirmed the judgment of CHANNELL, J., at the trial and of the Court of Appeal, giving judgment for Dunlops.

One might have doubted whether the mistake into which Dunlops fell was strictly one of fact, and not more analogous to the mistake in *Holt v. Markham*. It was, however, regarded as a mistake of fact at all stages of the trial, and the case is alluded to as one of mistake of fact by LORD SUMNER in *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd.*

The case establishes the following propositions :

1. the negation of the efficacy of crediting the money to an overdrawn account, setting it off against a debt, or asserting any lien on it ;
2. the definition of the respective positions of the man who takes as principal and the man who takes as agent money paid under mistake of fact. The answers of the jury left this question somewhat at large on the facts, but the principle was none the less established by the judgments.

The Lord Chancellor (LORD LOREBURN) said that Dunlops claimed that, in receiving the money, Kleinworts were really principals, and therefore liable to repay it, whether they had paid it over to others or not. Kleinworts claimed that the money had been paid to them as agents, and that they had accounted for it to their principals in a way equivalent to payment. In the view he took of the case, that was immaterial, for it was indisputable that, if money paid under a mistake of fact is re-demanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid, in whatever character it was received. And that that was the case there.

It might be suggested that this lends colour to the idea that a man who is paid and receives money under mistake of fact is not bound to repay it if his position has been altered, even though it was paid him and he received it as principal and not as agent, a proposition not in itself unreasonable. But the LORD CHANCELLOR does not really deal with the point, and the distinction is clearly established by the other judgments and the subsequent case of *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd.*

LORD ATKINSON reviewed all the authorities, and said :

"They seem to establish that whatever may in fact be the true

position of the defendant in an action brought to recover money paid to him in mistake of fact, he will be liable to refund it if it be established that he dealt as a principal with the person who paid it him. Whether he will be liable if he dealt as an agent with such a person will depend on this, whether, before the mistake was discovered, he had paid over the money he received to the principal, or settled such an account with the principal as amounts to payment or did something which so prejudiced his position that it would be inequitable to require him to refund."

That is a clear and complete statement of the position, on very high authority.

3. that crediting to customer's account goes for nothing ; that existence, continued existence of an overdraft far exceeding the payment in, is of no use ; that neither lien nor set-off against the customer avails against the claim of the payer by mistake, as constituting prejudicial change of position.

The Chancellor said that it had been contended at the trial that Kleinworts would not have continued, as they did continue, to make advances to Kramrisch if it had not been for this payment of £3000 by Dunlops. The jury in their answer to the third question refused to accept this view ; they considered that Kleinworts would have acted in exactly the same way if no payment had been made by Dunlops at all. There was evidence to support that finding, and so Kleinworts had not altered their position at all.

LORD ATKINSON was not altogether satisfied with the finding of the jury on the third question, but he agreed it could not be disturbed, and that consequently it must be taken that Kleinworts had not altered their position to their disadvantage in consequence of the payment.

The other Law Lords concurred.

One is left to infer that if further advances had been made, definitely on the strength of such payment in, that would have been a sufficient alteration of position.

Dunlops paid Kleinworts by cheque. At first sight, it might seem strange that while money innocently received on a negotiable instrument, whether by principal or agent, is not recoverable as paid under mistake of fact, unless immediately reclaimed, money paid by cheque should have been recovered in this case.

But there is nothing in it. There was nothing wrong with the cheque itself, no mistake of fact affecting it ; exigencies of negotiability only touch the instrument itself ; its negotiability was in no way impugned. So in *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd.* the payment was by cheque, but this did not stand in the way of the money received by means of it being recovered as money paid under mistake of fact. For fuller treatment of this case see *ante*, p. 240.

Kerrison v. Glyn, Mills, Currie & Co. (v) was a simpler case. Under a mistake of fact, Kerrison paid money into Glyn, Mills & Co.'s to the account of a customer who owed them a much larger sum on overdraft. They entered the payment in their books, and when Kerrison claimed it, set up their lien. They had made no further advances on the strength of the payment in. The bank relied on *Foley v. Hill* (w) as establishing their right of lien.

The House of Lords said, with regard to that case, that the language employed there was used solely with regard to the relation between a banker and his customer, negating the fiduciary character of the former, not affecting the rights of outside persons. It was not meant to be applied and did not apply to the case of money paid by such persons under mistake of fact. LORD SHAW said he did not think it would be correct, either in law or in business, to permit the recipient to impound money which his principal could not have honestly or legally retained. There being no right of lien and no further advances, the bank's position would not be prejudiced by their having to repay, which they had to do.

The solvency or insolvency of the customer appears to make no difference. The fact, that the banker has little or no chance of getting out of the customer the money he has to refund, does not enter into the question of whether he has prejudicially altered his position in reliance on the payment in.

It is immaterial that payment is made to an unidentified principal. In *Gowers v. Lloyds and National Provincial Foreign Bank Ltd.* (y) the bank had received from the Crown Agents for the Colonies, by the presentation of warrants, pension moneys payable to a servant of the Crown, who was in fact dead. The warrants had been forged and the assistance of the bank obtained by misrepresentation. In the action by the Crown Agents to recover the moneys paid in the belief that the pensioner was alive, the bank pleaded that it had paid over to its principal, which view was supported by the Court of Appeal (GREENE, M.R., SCOTT and MACKINNON, L.JJ.), the fact that the bank thought it was acting for the pensioner making no difference to its position.

(v) (1911), 81 L.J.K.B. 465; 3 Digest 170, 282.

(w) (1848), 2 H.L. Cas. 28.

(y) [1938] 1 All E.R. 766; Digest Supp.

CHAPTER 16

FORGERIES

SUMMARY—

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FORGERY is a crime, the creature of the criminal law—at first of the common law, now of statute law, just as much as murder. Unlike murder, however, the misdeeds which constitute forgery, like those which constitute theft or false pretences, obtrude into commercial relations and frequently give rise to lawsuits between innocent third parties.

When the common law, criminal and civil, had sway, courts could carry on their respective functions independently. A man might be hung or transported by a criminal judge for forging an acceptance; in a civil trial on the same bill it would be sufficient for the acceptor to show it was not his signature. The word forged or forgery might be used for convenience' sake, but not as the basis for decision. But now the common law, criminal and civil alike, has been almost entirely superseded by masses of legislation. At any rate, this is the case with the criminal law of forgery and the civil law of bills of exchange, and it is with the combined effect of these two lines of legislation that the banker is mainly concerned.

There seems to be no valid reason why the two systems should not have run parallel, without touching, if suitably drafted. The existing Forgery Act of 1913 does, for its part, declare that its definitions and provisions are 'for the purposes of this Act'. Unfortunately, the Bills of Exchange Act, 1882, has incorporated the technical term 'forged' in ss. 24 and 60 (a), and there is no definition or interpretation of that term in the Act.

The Bills of Exchange Act was passed in 1882; the existing forgery legislation in 1913 and 1925. It might be contended that the Bills of Exchange Act can only be interpreted according to the forgery legislation in force at the time of its passing, namely, the Forgery Act, 1861. The better view is that the later date of an act, indirectly affecting another, is no obstacle to its influence, provided always that the wording of the earlier act is wide enough to include the operation of the later one.

But, just as if one were using a dictionary to translate a foreign or technical term, one cannot interpolate that term, in its dictionary sense, into another act without regard to the context and general drift of the passage in which it occurs there. The interpretation, definition or description provided by the technical act must really fit and cover the situations, incidents and things dealt with by the other act. And, inasmuch as the effect of a later statute on an earlier independent one depends on the anticipatory capacity and wording of the latter, it is surely justifiable to consider the earlier statute in the light of the law existing at the time of its passing, analogous to that by which it is now sought to interpret it.

In 1882 the criminal law as to forgery was embodied in the Forgery Act, 1861. Under an earlier and repealed statute, 11 Geo. IV. & 1 Will. IV. c. 66, it had been held in *R. v. White* (b) that an unauthorised fraudulent 'per procuration J. S.' signed in the defendant's name was not a forgery, because the defendant had not forged J. S.'s name.

Section 22 of the 1861 Act provided that whosoever should *forge* any bill of exchange or any acceptance, indorsement or assignment of any bill of exchange, or any promissory note or indorsement or assignment of any such promissory note, with intent to defraud, would be guilty of felony and liable to a maximum penalty of penal servitude for life. Section 23 enacted like penalties for anyone who *forged* a warrant or order for the payment of money or any indorsement thereof, and this has been held to cover cheques.

Section 24 was altogether new and was enacted to stop the gap disclosed by *R. v. White*. It dealt with *per pro.* signatures, and carefully avoided the use of the word 'forges'. It included cheques by importing words from s. 23. It enacted that whosoever should, with intent to defraud, draw, make, sign, accept or indorse any bill of exchange or promissory note or any order, authority or request for the payment of money by procuration or otherwise, for, or in the name of, or on the account of any other person, without lawful authority or excuse, would be guilty of felony and liable to a maximum penalty of penal servitude for 14 years.

One distinction and demarcation is clear. Fraudulent counterfeit of a man's actual signature, forgery: maximum penalty, life. Fraudulent unauthorised execution *per pro.*, not forgery, but a new statutory unnamed crime: maximum penalty, 14 years.

R. v. White established that fraudulent unauthorised *per pro.* signature was not forgery; this section does not make it forgery. Even the measure of punishment is different.

This, then, was the position when the Bills of Exchange Act was passed. It might have avoided the use of the words

(b) (1847), 2 Car. & Kir. 404; 15 Digest 1049, 11,833.

'forged' or 'forgery'. As before stated, it is the absence of the contractual element, the non-signature of a negotiable instrument, which is the root of the matter in civil proceedings, not the existence of a crime or any particular crime. But the Bills of Exchange Act does use the words 'forged' and 'forgery' in ss. 24 and 60. But it always uses the word in antithesis or as the alternative to another clause: "Where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be". The obvious origin of this phraseology is the 1861 Act. 'Forged', s. 22 Forgery Act, 1861, actual counterfeit signature: unauthorised representative signature, s. 24. And the two things are disjunctive; must be treated separately. If a thing is within s. 22 it is not within s. 24, and *vice versa*. If it is an authorised representative signature it cannot be a forgery. 'Placed thereon' merely refers to the actual physical writing, not the use made thereof or the intention with which it is affixed.

The proviso to s. 24 of the Bills of Exchange Act rather bears this out where it speaks of ratification of an unauthorised signature, not amounting to forgery. There was then some question about the possibility of ratification of a downright forgery, though perhaps there is not now, after the case of *Greenwood v. Martins Bank, Ltd.* (c), in which SCRUTTON and GREER, L.JJ., referring to *Brook v. Hook* (d), *Kelner v. Baxter* (e), *Re Empress Engineering Co.* (f), *Re Northumberland Avenue Hotel Co.* (g), gave their view that there could be none; "a forgery which does not profess to be executed by a person as agent cannot be ratified by the alleged principal". The proviso is presumably intended to safeguard ratification of unauthorised *per pro.* signatures, thus emphasising the distinction between them and forgeries.

It is true that lawyers, and even judges, very often in connection with indorsements, used the term 'forged indorsement' indiscriminately to describe either one strictly forged or one *per pro.* without authority. The learned author was conscious of having done so in these pages, but it is not worth correcting. It served as a convenient phrase, but cannot affect the innate difference between the things. Following closely on the 1861 Act, came the Companies Act of 1862, which also bears signs of the influence of the 1861 Act.

Section 47 enacts:

"A promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any company under this Act if made, accepted, or endorsed in the name of the company

(c) [1933] A.C. 51; Digest Supp.

(d) (1871), L.R. 6 Exch. 89; 1 Digest 397, 994.

(e) (1866), L.R. 2 C.P. 174; 1 Digest 401, 1019.

(f) (1880), 16 Ch. D. 125; 12 Digest 47, 256.

(g) (1886), 33 Ch. D. 16.

by any person acting under the authority of the company, or if made, accepted, or endorsed by or on behalf of or on account of the company by any person acting under the authority of the company."

The words 'or if made, etc.' were new, an addition to s. 43 of the previous Act, 19 & 20 Vict. c. 47. They clearly recognise the distinction between the actual forgery of the company's signature and the unauthorised use of that signature by assumed derogated authority.

Although unusual, the mere affixing of a company's official name, if authorised, is perfectly good execution, as recognised by this section, and fraudulent writing of that name without authority would therefore be forgery. This s. 47 of the Companies Act, 1862, is reproduced *verbatim* as s. 77 of the Companies (Consolidation) Act, 1908, and now stands as s. 30 of the Companies Act, 1929 (*h*).

Neither drawing nor cheques is specifically included. The defects of drafting must be supplemented by common-sense. 'Made' must be read to include 'drawn'; cheques must be imported since the greater includes the less or *ex necessitate rei* or because the Bills of Exchange Act constitutes them bills (*i*).

Gradually certain distinctly reasonable constructions were judicially engrafted into the system, derivable, for civil purposes, from these Acts: the Forgery Act, 1861, the Companies Act and the Bills of Exchange Act.

Probably owing to the multiplication of joint stock companies, the obvious impossibility of everyone who had dealings with them satisfying himself of the authority of those who purported to deal on their behalf, and the necessity of maintaining the negotiability of the instruments which formed the chief medium of such dealings, there evolved the salutary, if somewhat artificial, doctrine of imputed derogated authority, of late years drastically criticised and circumscribed, see *ante*, 'Special Customers—Joint Stock Companies'. It fell into line with the Bills of Exchange Act, as being of the nature of the preclusion under s. 24 (*j*) which prevents the setting up of the forgery or want of authority.

It is rather curious that s. 25 (*k*) does not seem to have figured in these cases. In view of the word 'actual' in that section, it might be very difficult to say that imputed derivative authority was enough.

It may be that it was tacitly recognised that, since companies' execution of negotiable instruments must necessarily be by human agency, strict adherence to the letter of this section would defeat the whole idea; it may be that in the particular instances the form of representative signature was

(*h*) 2 Halsbury's Statutes 791.

(*i*) Cf. "Journal of Institute of Bankers", vol. 1 (1929), p. 399.

(*j*) 2 Halsbury's Statutes 46.

(*k*) 2 Halsbury's Statutes 46.

not categorically *per pro.* but the more usual form in company signatures 'on behalf of' or 'on account of', which, according to the judgment in *Macdonald & Co. v. Nash & Co.* (1) in the Court of Appeal, and a very prevalent opinion, are not within the purview of s. 25. Or it may be that the cases were of parties having received the money and being sued for conversion and money had and received, to which state of things it was once thought (m) that s. 25 had no application. *Morison's Case* was, however, overruled in this respect by the House of Lords in *Midland Bank, Ltd. v. Reckitt* (n).

At an early date it was recognised that innocent holders of negotiable instruments, such as bills of exchange, were entitled to preferential treatment under this doctrine. In *Re Land Credit Co. of Ireland, Ex parte Overend, Gurney & Co.* (o), SELWYN, L.J., says :

"... if, when an act within the scope of the powers of the board of directors is done by them or (which is the same thing) is ratified and adopted by them, a person contracting with the directors is not bound to see that certain preliminaries . . . have been gone through, still less, in my judgment, are innocent holders of a negotiable security bound to enquire whether those preliminaries have been observed."

The case of *Ruben v. Great Fingall Consolidated* (p) has recently been cited as an authority that the doctrine does not apply where the negotiable instrument is a forgery. This case will be dealt with later.

Further, towards the close of this period, it was definitely established that the fraudulent misuse of authority did not invalidate a negotiable instrument in the hands of an innocent holder ; that a document could not be valid for one purpose, invalid for another ; genuine in the hands of one person, a forgery in the hands of another. Authority, once exercised, is not retracted by abuse of the product of that authority. As PHILLIMORE, L.J., said in *Morison v. London County and Westminster Bank, Ltd.* (q) :

"Where there is power to sign *per pro.*, a document so signed is not a forgery to the person to whom it is addressed and who can, or, *a fortiori*, must, act upon it, and therefore it is not a forgery at all. The misuse by an agent of his power of writing his principal's name, either as a simple signature or by signing *per pro.*, may, however, be indictable as some form of fraud."

And the same principle applied in the case of imputed derogated authority.

All the events which led up to *Morison's Case* occurred prior to 1913, so that the subsequent forgery legislation now

(1) [1922] W.N. 272.

(m) *Morison v. London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356 ; 6 Digest 443, 2851.

(n) [1933] A.C. 1 ; Digest Supp.

(o) (1869), 4 Ch. App., at p. 469 ; 6 Digest 97, 687.

(p) [1906] A.C. 439 ; 9 Digest 289, 1794.

(q) [1914] 3 K.B., at p. 381 ; 15 Digest 1049, 11,834.

to be dealt with was inapplicable to that case. In 1913 the Forgery Act, 1913, was passed. In 1925 a sub-section, s. 35 (1), was introduced into the Criminal Justice Act, 1925 (r), for the purpose of removing doubts affecting the 1913 Act.

The 1913 Act is entitled "An Act to consolidate, simplify and amend the law relating to forgery and kindred offences". It repeals ss. 22 and 24 of the 1861 Act and other portions thereof. It is a purely criminal statute and in terms limits its interpretation and operation to its own sphere and object. It enacts, s. 1 (1) :

"For the purposes of this Act, forgery is the making of a false document in order that it may be used as genuine, . . ."

Section 1 (2) (s), stands in a peculiar position. It was presumably designed as an interpretation section, but s. 35 (1) of the Criminal Justice Act, 1925, renders it of little or no value for that purpose by enacting that its definitions are not to be regarded as limiting or controlling the interpretation of 'false document' in s. 1 (1). The resultant position is vague and unsatisfactory and must be further developed. Section 1 (2) runs thus :

"A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by or on behalf of or on account of a person who did not make it nor authorise its making ; or if, though made by or on behalf or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein, and in particular a document is false," (t)

"(a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein ;"

The remainder of s. 1 (2) consists of a succession of similar paragraphs, alphabetically distinguished and commencing 'if', setting forth various conditions of, and dealing with, documents which constitute such documents 'false'. It does not seem necessary to set them out here, for the following reason.

On 13th September, 1922, the case of *R. v. Foley* was tried at the Central Criminal Court, by BRANSON, J. It is not reported, but Mr. Otter, in his book on the Criminal Justice Act, 1925, says that the Judge held that the definition in sub-s. (2) of the 1913 Act was exclusive and that a document which was a bogus document from beginning to end was not within it. In consequence of this a section (35) was introduced into the Criminal Justice Act, 1925 (u). It runs as follows :

(r) 11 Halsbury's Statutes 417.

(s) 4 Halsbury's Statutes 787.

(t) Note that the word 'lawful' before authority in the 1861 Act is here omitted : inconsistent with narrowing the meaning of 'authority'.

(u) 11 Halsbury's Statutes 417.

“For the purpose of removing doubts, it is hereby declared that a document may be a false document for the purposes of the Forgery Act, 1913, notwithstanding that it is not false in any such manner as is described in sub-s. (2) of s. 1 of that Act.”

This covers not only the ‘in particulars’ but the prior portion of sub-s. (2) which contains the general definition of a false document. It leaves s. 1 (1) absolutely untouched.

The 1925 enactment does not purport to repeal any part of sub-s. (2) : it apparently leaves it like a selection of samples or the examples annexed to a rule of grammar. It neutralises *R. v. Foley* and declares that sub-s. (2) is not exhaustive or comprehensive.

Of course, professedly and primarily, both the above are designed for the administration of criminal justice only. But, as before stated, the use of the words ‘forged’ and ‘forgery’ in the Bills of Exchange Act renders it inevitable that contemporary criminal enactments should to some degree be imported into civil actions relating to bills, notes or cheques.

The 1913 Act has already been so utilised in the *Kreditbank Kassel Case* in 1927, hereinafter dealt with (v).

Since the obliteration by the 1925 Act of all boundaries imposed or indicated in the 1913 Act, save that the subject matter must be a ‘document’, judges and courts will, in bill cases, have no settled criterion of forgery to work on. Forgery will be a formula to be evolved out of the tribunal’s own inner consciousness. It seems improbable that this system will, in practice, be adopted by the civil courts. They will, most likely, in effect confine themselves to the 1913 Act, if and where applicable.

Section 1 (2) of the 1913 Act (w) for the first time makes unauthorised representative signature forgery, not the unnamed felony it was under the 1861 Act. But it must be the making of a document. To the ordinary mind, the making of a document means the actual physical creation of a complete, self-contained instrument or writing embodying terms, information, or literary matter, such as a bill of exchange, a deed, or a literary composition. But the Act apparently, though vaguely, annexes another and artificial meaning to ‘document’. In s. 1 (2) (see *ante*) it says a document is false if any alteration by addition, insertion, or otherwise has been made therein. Here the alteration, whether by superimposed matter or ‘obliteration, erasure, or removal,’ constitutes either a ‘document’ in itself or converts the original document into a new one, a sort of palimpsest, of which the author is the person making the alteration, not the original maker. In s. 2 (2) the Act refers to ‘indorsement’ and ‘acceptance’ as an independent document each, though merely for the purpose of allotting the maximum penalty for forging these particular items (see *post*).

(v) See p. 269, *post*.

(w) 4 Halsbury’s Statutes 787.

Such conception of a 'document' is abnormal and ungrammatical. It is not easy to see how 'obliteration, erasure, or removal' can, in any sense, be the making of a document. Neither addition nor alteration, in ordinary language, constitutes an original document a new one or is a document in itself. And it is running counter to the Bills of Exchange Act and all business phraseology and understanding to regard or treat either acceptance or indorsement as a separate, independent, 'document' (see *post*). It is not easy to formulate, even speculatively, the full bearing of this new legislation on the Bills of Exchange Act and banking generally. It does not apply to Scotland, which, in itself, may lead to some complications, unless an identical Act is in force then, which seems improbable.

Two things must be borne in mind: (1) the 1913 Act is a criminal statute and must be interpreted strictly, more so when it is sought to bring it into civil proceedings than when it is being applied in its proper sphere, to which it professes to confine its operation; (2) that, as before stated, the Bills of Exchange Act, being prior in date, must be shown to admit its application, and, as previously submitted, then-existing legislation and circumstances must be taken into consideration (x).

Under s. 1 (1) forgery is confined to the *making* of a false document, whatever may be, under the provisions of the 1913 Act or the expansive powers of the 1925 one, the necessary characteristics of falseness.

The 'making' of a bill or cheque is complete when it is drawn in accordance with the requirements of the Bills of Exchange Act, or in the case of a bill or cheque payable to drawer's order—if the majority judgment in *Macdonald (Gerald) & Co. v. Nash & Co.* (y) be accepted—when it is indorsed by drawer. The sub-section, therefore, covers drawing and, in the case of the bill or cheque to drawer's order, apparently indorsement by that drawer. With regard to drawing, therefore, the argument is this, that where there is derogated authority, actual or implied, expressed as such, the converse of the 'without authority' of s. 24 (z) applies, constitutes authority, and excludes the 'forged'. But how about other indorsements and acceptance?

The word 'acceptance' or 'indorsement' only occurs once in the 1913 Act. In s. 2 (2) it says:

"Forgery of the following documents, if committed with intent to defraud, shall be felony and punishable with penal servitude for any term not exceeding fourteen years:—

(a) Any valuable security or assignment thereof or endorsement

(x) Cf. *A.-G. v. Edison Telephone Co. of London* (1880), 6 Q.B.D. 244; 42 Digest 885, 1.

(y) [1922] W.N. 272; reversed, [1924] A.C. 625; Digest Supp.

(z) Bills of Exchange Act, 1882; 2 Halsbury's Statutes 46.

thereon, or, where the valuable security is a bill of exchange, any acceptance thereof ; ”

This clause is an instance where, in the Act, ‘document’ seems used to denote something superimposed on an original complete document as constituting a document in itself. The ‘valuable security’, the bill, is one document ; the indorsement or acceptance another ; where both occur on one bill, each is a ‘document’. The section is a purely criminal one, merely fixing the maximum penalty for forgery of any one of these ‘documents’. Presumably if a man forged the bill, the acceptance and the indorsement, he might be awarded three terms of 14 years’ penal servitude.

But to treat this casual, contradictory mention, in a purely and professedly criminal Act, in a section dealing solely with terms of penal servitude, of ‘acceptance’ and ‘indorsement’, as constituting them, for all purposes, ‘documents’, a term which the Act does not define, which no judge, dictionary, law book, or business man has even called them since the first bill was drawn ; to import this construction into the Bills of Exchange Act, passed 30 years before, uncalculated and unfitted for its reception, enacted under and to meet a totally different system of criminal law, and apply the result to a civil action on a bill of exchange, is a perversion of law, which the learned author declined to contemplate as settling the question. If such effect were to be given to this sub-section it would involve that, under s. 1 (3, c) a coupon for fixed interest, if crossed, would have to be held entitled to the benefits of the crossed cheques sections, which it is not, s. 95 of the Bills of Exchange Act, 1882, being confined to ‘warrants for the payment of dividend’, see *ante*, chapter 7.

Is there, then, any legitimate method by which the 1913 Act can be applied to acceptance and indorsement, and so make the ‘forged’ override the ‘without the authority’ of s. 24 of the Bills of Exchange Act, to the possible ruin of the imputed derogated authority doctrine ?

The question of indorsement is specially urgent, because the majority of the cases deal with indorsement on behalf of the company by fraudulent directors or other officers.

In any case, it would have to be on the other forced and unnatural interpretation of the Act, namely, that, by certain subsequent dealings therewith, an originally genuine document becomes a false document, of which the author of those dealings is the technical maker.

Does sub-s. (2), before quoted, ‘if any material alteration whether by addition, insertion, etc.’, meet the case of acceptance or indorsement ? The punitive sub-section cited above, by specifying these, might be taken to imply that neither falls within that category.

Next, it will be noticed that ‘addition’ and ‘insertion’

are both classed under 'material alteration'. Under pre-existing law, alteration and addition were differentiated. A man indicted for forging a bill could be convicted if he had altered the original bill, but not if he had forged the acceptance or indorsement, that being regarded as collateral to the bill. Section 22 of the 1861 Act dealt specifically with acceptance and indorsements as well as alteration.

Under the Bills of Exchange Act neither acceptance nor indorsement is either an alteration of or addition to the bill or cheque. Acceptance is the signification by the drawee of his assent to the order of the drawer (a). A bill may be accepted while otherwise incomplete (b). Indorsement is treated in s. 31 (3) (c) as purely matter of transfer of a completed bill, just the same as is the delivery of a bearer bill in s. 31 (1). No business man would ever call an acceptance or indorsement an alteration of or addition to a bill. Both acceptance and indorsement are treated as independent supervening contracts in s. 72 (1) (d) :

"The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such a contract was made."

A supervening contract, made by different people, in a different place, under different law, can hardly be either part of the making of the instrument or an alteration thereof or addition thereto. This point is emphasised by the use in the Bills of Exchange Act of the words 'alteration' and 'addition', in their legitimate meaning and connection. As to 'alteration', see s. 64 (e); as to 'addition', strictly confined to the crossing on a cheque, see s. 76 (f).

As the above conclusions or arguments are somewhat inconsistent with the *Kreditbank Kassel Case*, next to be dealt with, it seems well to summarise them here.

1. The 1913 Act itself uses the words 'authorise its making' and 'authority', omitting the 'lawful' of the 1861 Act. Interpretation, in civil cases, should be broader rather than narrower.

2. The Bills of Exchange Act was passed in different circumstances and state of criminal law; its terms do not admit of the importation of this subsequent criminal legislation to vary its effect as established by judicial interpretation, specially with regard to imputed derogated authority or holder in due course.

3. The 1913 Act does not touch acceptance or indorsement

(a) s. 17 (1); 2 Halsbury's Statutes 42.

(b) s. 18 (1); 2 Halsbury's Statutes 42.

(c) 2 Halsbury's Statutes 49.

(e) 2 Halsbury's Statutes 68.

(d) 2 Halsbury's Statutes 71.

(f) 2 Halsbury's Statutes 74.

in the Bills of Exchange Act, neither being a 'document', an 'addition', or an 'alteration'.

4. The established doctrine that, for civil purposes, a signature, whether actual or *per pro.* affixed by authority, express, implied or imputed, does not become a forgery by fraudulent misapplication or misuse, remains in full force.

Some twelve years or so after the passing of the Forgery Act, 1913, came the case of *Kreditbank Kassel G.m.b.H. v. Schenkers* (g). It appears to be the first case in which the effect of the Act on civil proceedings as to bills and on the doctrine of imputed derogated authority formed the ground of decision. The local manager of a company drew and indorsed bills in the company's name in representative form and his official capacity. There was in the articles very wide power to derogate the drawing and indorsing of bills, probably wide enough to have covered derogation to the local manager, but rather on the border line in view of his position as a local manager only. Certain powers as to cheques had been derogated to him, but no power to draw or indorse bills.

The judge in the court below found imputed derogated authority and *bona fide* holder for value, and gave judgment against the company. The Court of Appeal, while doubting the finding as to imputed authority, did not overrule it, or the other finding. They reversed the judgment on the ground that the bills were forgeries within the 1913 Act, consequently void under the Bills of Exchange Act, and that the doctrine of imputed derogated authority does not apply where the document in question is a forgery. On the first point, ATKIN, L.J., said the bills were "forgeries, they were false documents and fraudulent documents, concocted for fraud". SCRUTTON, L.J., says (h) :

"Now it seems to me clear that this document is a forgery within the language of the Forgery Act. It contains a false statement, namely, that the manager is acting for the company and it purports to bind the company . . . and those two elements appear to make the document a forgery within the Forgery Act."

He is the only member of the court who specifies what, in his opinion, brought the bill within the Act, namely, that it contained a 'false statement'. There is no such phrase as false statement in the 1913 Act. The nearest thing is in s. 1 (2), dealing with otherwise genuine documents in which a distinguishing or identifying number or mark 'is falsely stated therein', which obviously has no bearing on the matter in question. The 'false statement' seems to refer to the 'on account of' or 'on behalf of' as implying the statement that the signatory 'was acting for the company and purporting to bind the company'. It is doubtful whether this is within the

(g) [1927] 1 K.B. 826 ; 32 Com. Cas. 197, C.A. ; Digest Supp.

(h) [1927] 1 K.B., at p. 840 ; 32 Com. Cas. 209.

wording of the Act. The 'material part' is the signature, as in the earlier 1861 Act and the Bills of Exchange Act ; the other is mere introduction, showing only by whose authority the document purports to have been made, rather like the 'yours faithfully' preceding the signature of an ordinary letter.

If the above be the correct interpretation of the words of SCRUTTON, L.J., it gives ground for thought. 'Acting for the company', as a statement, means acting in the interest of the company, for the company's purposes. That involves the then state of the man's mind, a question of fact, but one hard to diagnose or determine.

Under s. 1 (1) the intention to use the document as genuine and the making of the false document must absolutely coincide in time. But for the *dictum* of SCRUTTON, L.J., one would have no difficulty in saying that the rule in *Morison's Case* remains intact, that a document made with authority could not become a forgery by misuse, although that misuse was intended from the first ; it was genuine to start with and it could not be forgery to intend to or use it as genuine.

But if the connection between the two signatures is to be read in the sense above suggested, with the result stated by SCRUTTON, L.J., it would follow that a man possessing full delegated power would make the document a false one if, at the moment he made it, he had the intention of using it, not for the company's purposes or in its interest, but for and in his own. This, from a new point of attack, would strike at *Morison's Case*.

The difficulty would be to prove the synchrony of intention and making, short of actual confession. Where there is no authority and fraudulent use, or where the form of the document is inconsistent with legitimate use for the company's purposes, the intention may reasonably be inferred to have accompanied the making. But other cases, where there is derogated authority misused, would be far more doubtful. If indorsement ever be admitted to be a 'document', the question might arise in cases like those of a director or manager indorsing cheques on his company's behalf and applying them to his own purposes in fraud of the company. Did he intend to do so when he indorsed them or was it sudden temptation ? If the point ever comes to anything, imputed derogated power should be treated on the same footing as actual.

The question did not arise in acute form in the *Kreditbank Kassel Case*, because there the manager both drew and indorsed the bills and then fraudulently applied them to his own use, so that, as ATKIN, L.J., said, they were concocted for the purpose of fraud. The *dictum* of SCRUTTON, L.J., may possibly, therefore, be some day held not seriously to impugn the authority of *Morison's Case* ; but it seemed worth referring to here.

It is to be noted that, as the bills in this case were drawn, as well as indorsed, by the local manager, the question as to an

indorsement being 'a document' within the 1913 Act, previously discussed, did not arise.

But altogether apart from this, the case is disquieting enough. By importing the Forgery Act wholesale into the Bills of Exchange Act it recognises a perfectly new standard and test of 'forged' and 'forgery' as used in the latter; even in the case of actual counterfeiting forgery, susceptible, moreover, under the 1925 Act, of infinite expansion. Just as the 1913 Act does with the 1861 Forgery Act, ss. 22 and 24, it swamps the 'without authority' of s. 24 of the Bills of Exchange Act (j) in the 'forged', to the exclusion of the imputed derogated authority.

There is one further point to be noticed. At p. 207 of 32 Com. Cas., in this case, SCRUTTON, L.J., says :

"... the doctrine that you are deemed to have notice of articles, and need not enquire as to whether the domestic arrangements necessary to carry them out have been made, does not apply where the document to which that principle is sought to be applied is a forgery",

and he quotes *Ruben v. Great Fingall Consolidated (k)*. In that case the Lord Chancellor did say that the doctrine, that persons dealing with limited liability companies are not bound to enquire into their indoor management and are not affected by irregularities of which they have no notice, applied only to irregularities which might otherwise affect a genuine transaction and did not apply to a forgery.

But the case was an exceptional one. A secretary of the company forged a transfer of some of its shares, abstracted the company's seal, affixed it without any authority whatever, fraudulently and for his own ends, to a certificate of those shares, forged the names of two directors to the certificates and got the money for the shares, was convicted and sent to penal servitude. The only things to be said about this are as follows : the case was decided mainly on other grounds, namely, the non-responsibility of an employer for frauds of his employee, committed solely for the latter's own benefit, and in fraud of that employer. It was not a case of a bill of exchange, and so not calling for the preferential treatment before mentioned. At that date the fraudulent signing *per pro.* of a bill was not a forgery, but an unnamed felony. The Chancellor must be taken to be speaking of what were forgeries at that date, and he admits the imputed authority doctrine apart from them. He cannot be taken to have included the 1913 Act by anticipation. On the lines before laid down, it is not legitimate to import, *via* a later criminal statute, into an earlier commercial act, a legal proposition directed towards the earlier state of the law and which that commercial act is not framed to assimilate ; that acceptance and indorsement are not, now,

(j) 2 Halsbury's Statutes 46.

(k) [1906] A.C. 439 ; 9 Digest 289, 1794.

the subject of forgery, save for punitive purposes ; that, since 1906 and since 1913, there have been a good many cases of imputed derogated authority relating to bills. Forgery or unauthorised signature must have been a constituent of these. Yet, till the *Kreditbank Kassel Case*, none seems to have been decided on this basis of forgery, or the point raised.

Forged foreign indorsement

Forged indorsement does not defeat the title of a person who, in a foreign country, has taken a bill or cheque with such indorsement, if by the law of that country an effective title was thereby acquired ; at any rate not so as to render him or his transferee liable for conversion of the instrument. Whether a title to sue prior parties is conferred by such indorsement is an open question (1).

In the remainder of this chapter the foregoing part thereof must be taken as read, and, where applying, applied. It will not be referred to, save perhaps casually.

Protection of bankers against forgeries

The provisions of the Bills of Exchange Act protecting bankers from the effects of forged or unauthorised signatures under s. 24 are : s. 60, paying cheques on forged indorsement (m) ; s. 80, paying crossed cheques in conformity with the crossing (n) ; and s. 82, collecting crossed cheques for a customer (o) ; which are dealt with under the appropriate headings. There are certain other documents such as drafts on a banker which obtain limited protection under s. 19 of the Stamp Act, 1853 (p), and s. 17 of the Revenue Act, 1883 (q), as to which see "Documents analogous to Cheques," *ante*, p. 127.

Main dangers

The main dangers to the paying banker for which the Act does not provide are the following :

1. forgery of his customer's signature as drawer of cheques ;
2. fraudulent alteration of the amount of cheques presented for payment ;
3. forged indorsement of bills accepted payable with the paying banker.

Apart from adoption or estoppel, there is no right in the banker to debit the customer with the amount of a cheque which he has paid, to which the drawer's signature is a forgery. The money has been paid without authority. It is not essentially a question of forgery within the limited definitions of the recent forgery Acts. It is not really a question of the banker's

(1) *Embricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677 ; 3 Digest 234, 649.

(m) 2 Halsbury's Statutes 66.

(n) 2 Halsbury's Statutes 75.

(p) 1 Halsbury's Statutes 543.

(o) 2 Halsbury's Statutes 76.

(q) 16 Halsbury's Statutes 547.

being bound to know his customer's signature or of whether he was negligent or not in not detecting the forgery, though both these grounds have been put forward and, more or less, judicially approved. The same principle applies to fraudulently raised cheques, if not to the whole amount, at any rate to the increase.

A cheque to which the drawer's signature is forged is a mere piece of paper, not a cheque at all, unless it be adopted by the drawer or become valid by estoppel as against an indorser (*r*).

As to payment of domiciled bills on forged indorsement, the money has been paid to a person other than the one directly or indirectly designated by the customer, and so contrary to his mandate or authority.

In each of the above cases, the banker's only chance of being able to charge the customer is where the conduct of the customer establishes an estoppel or amounts to adoption or ratification of the instrument.

SECTION 1.—THE CUSTOMER'S SIGNATURE TO A CHEQUE

Apart from adoption or ratification it is not easy to define where estoppel as to the actual forgery of the customer's signature to a cheque comes in, even on the present basis of the customer's duty. Mere carelessness in keeping the cheque book is, of course, no use. In fact, it is generally adduced as the *reductio ad absurdum* of the contentions as to estoppel by negligence (*s*).

The entrusting of the occasional drawing of cheques to an agent, who subsequently draws others without authority, would come rather under the head of holding-out than of estoppel by breach of duty.

The lack of supervision over an agent, who might have access to the cheque book and opportunities for concealing forgeries committed by him, is probably too remote in this connection (*t*). The theory of negligence by unreasonable trust in a subordinate, enunciated in *Re North British Australasian Co., Ltd., Ex parte Swan* (*u*), is a stronger line, though, at present, more distinctly adopted in America than here (*w*).

If it were shown that the customer had accredited the cheque to the bank, or actively misled the bank into paying it,

(*r*) See *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49; 3 Digest 233, 646.

(*s*) See, for instance, *per* LORD HALSBURY, in *Scholfield v. Londesborough (Earl)*, [1896] A.C., at p. 531; 6 Digest 384, 2518; *Farquharson Brothers & Co. v. King & Co.*, [1902] A.C., at p. 336; 21 Digest 289, 1021.

(*t*) See *Bank of England v. Vagliano Brothers*, [1891] A.C., at p. 115; 3 Digest 244, 703; *Farquharson Brothers & Co. v. King & Co.*, [1902] A.C. 325; 1 Digest 377, 828.

(*u*) (1860), 7 C.B.N.S. 400, at pp. 442, 447; 9 Digest 214, 1342.

(*w*) See *post*, p. 358.

in any of the ways exemplified in *Vagliano's Case*, that would no doubt establish an estoppel.

But though concrete examples may not readily suggest themselves, it is clear that negligence, disregard of ordinary precautions, of the reasonable protection of the banker against injury, even through forgery, may estop the customer from disputing payment of a cheque to which his signature has been forged as drawer.

"The principle is a sound one, that where a customer's neglect of due precaution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine." (y)

This view was referred to and adopted by LORD HALSBURY in *Scholfield v. Londesborough (Earl)*, where he says (z) :

"If, to use Lord Cranworth's phraseology, the customer, by any act of his, has induced the banker to act upon the document, by his act or neglect of some act usual in the course of dealing between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled or by neglect permitted to be misled."

The only case in which the banker would 'make a payment on a forged order', to use LORD CRANWORTH's words, would be where he paid a cheque with the drawer's signature forged ; 'invalidity of a document which he has induced them to act on as genuine' points to the same conclusion ; thus the original judgment and its approval by LORD HALSBURY cover the situation (a).

The above were two of the numerous *dicta* which it was impossible to reconcile with the decision in *Colonial Bank of Australasia, Ltd. v. Marshall* (aa) ; but that obstacle being now removed, they carry full weight.

Contributory negligence

Neither estoppel nor adoption can be effectually set up by a person whose own conduct or negligence has occasioned or contributed to the loss, and this, of course, applies to the case of the banker. SCRUTTON, L.J., in *Greenwood v. Martins Bank, Ltd.* (b), stated that there was no English authority for this view, that the American authority, *Critten v. Chemical National Bank of New York* (c), was explained by the fact that the United States law had gone much further than English law as to the mutual duties of banker and customer. But he pointed out that, in the case before the court, "while the carelessness of

(y) *Per* LORD CRANWORTH, in *Orr and Barber v. Union Bank of Scotland* (1854), 1 Macq., at p. 513.

(z) [1896] A.C., at p. 523.

(a) *Cf. Lewes Sanitary Steam Laundry Co., Ltd. v. Barclay & Co., Ltd.* (1906), 95 L.T. 444 ; 3 Digest 231, 635.

(aa) [1906] A.C. 559 ; 3 Digest 233, 643.

(b) [1932] 1 K.B. 371.

(c) (1902), 171 N.Y. 219.

the bank was a proximate cause of the bank's loss in paying the forged cheques, it was not the proximate cause of the bank's losing its right of action against the forger. That was caused by the failure of the husband to inform the bank of the forgery till his wife was dead and the cause of action was lost." In other words, the loss in the case was not the loss of the money wrongfully paid away, but the loss of the right to sue for its recovery. And it was in respect of this loss that the bank successfully sought to set up estoppel. As it was put by LORD TOMLIN in the House of Lords (*d*), "for the purpose of the estoppel, which was a procedure matter, the cause of the ignorance (which prevented the bank from suing) was an irrelevant consideration".

No doubt many of the earlier cases speak of a banker being bound to know his customer's signature, and of its being *ipso facto* negligence if he is misled by a forgery, but there can be no legal obligation of the sort, the law does not compel or exact the impossible, and, as pointed out by MATHEW, J., in *London and River Plate Bank v. Bank of Liverpool* (*e*), if the forgery is cleverly executed, the banker may not be able by any amount of care to ascertain whether or not his customer's signature is a forgery.

As counterbalancing estoppel, it would seem therefore to be a question of fact whether the banker by exercising a due amount of care should have detected his customer's supposed signature to be a forgery.

As to whether the banker can recover the money from an innocent person to whom he has paid the cheque with the drawer's signature forged, see *ante*, 'Payment by Mistake'.

SECTION 2.—RAISED CHEQUES

The second and more imminent head of danger to the banker from forgery is the fraudulent raising of the amount of a cheque. Where the customer has originally drawn the cheque in the ordinary way, not leaving blanks or affording other facilities for alteration or addition, and the cheque is subsequently fraudulently manipulated so as to show a higher face value, which is paid by the banker, he clearly cannot charge his customer with the excess (*f*).

FACILITIES FOR RAISING

The real question arises when the customer, in drawing the cheque, innocently but carelessly leaves blank spaces before or after the words and figures specifying the amount. Sometimes the cheque is specially and intentionally so drawn by a

(*d*) [1933] A.C. 51; Digest Supp.

(*e*) [1896] 1 Q.B. 7; 6 Digest 107, 737.

(*f*) *Hall v. Fuller* (1826), 5 B. & C. 750; 3 Digest 233, 645.

clerk or employee contemplating fraud, and innocently signed by the employer in that condition. In either case the blanks are utilised by a fraudulent person to raise the face value of the cheque, and the raised amount is paid innocently and without negligence by the banker, the addition not being discoverable by exercise of reasonable care and diligence.

In some former editions of this book, it was at this point that the author was driven to long and strenuous argument combating the fallacies of *Colonial Bank of Australasia, Ltd. v. Marshall*, demonstrating how earlier authorities and judgments of far greater weight were totally opposed to the erroneous and devastating conclusions arrived at in that unfortunate decision, and championing the impugned character of the historic *Young v. Grote* (g). Fortunately, all this can now be omitted, as ancient history. *London Joint Stock Bank, Ltd. v. Macmillan and Arthur* is inexpugnable and conclusive. It demolishes the *Colonial Bank of Australasia* incubus as being an absolutely erroneous decision; it rehabilitates *Young v. Grote* as good law, and good law on the basis most beneficial to bankers.

The Macmillan Case

For the facts in *London Joint Stock Bank, Ltd. v. Macmillan and Arthur*, and the view taken by LORD FINLAY, C., as to this matter, see *ante*, pp. 170 *et seq.* (h).

Two passages only from the judgment of LORD FINLAY need be repeated here :

"If he (the customer) draws a cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty."

"As the customer and the banker are under a contractual relation in this matter, it is obvious that, in drawing a cheque, the customer is bound to take usual and reasonable precautions to prevent forgery. Crime is, indeed, a very serious matter, but everyone knows that crime is not uncommon. If the cheque is drawn in such a way as to facilitate or almost to invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence of this description."

These then are the indisputable rules to be henceforth applied in every case of this sort. It comes to this: was it neglect of ordinary precautions to issue a cheque in such form, having regard to the possibility of its getting into dishonest hands?

It is much a question of degree. One sees, for instance, the force of the remarks of BOVILL, C.J., in *Société Générale v. Metropolitan Bank, Ltd.* (i), where a 'y' was inserted in a slight blank left after an 'eight' in a bill, that "it was the usual

(g) (1827), 4 Bing. 253; 3 Digest 232, 640.

(h) Cf. the summary of the reciprocal duties of banker and customer, by ATKIN, L.J., *ante*, p. 30.

(i) (1873), 27 L.T. 849; 6 Digest 383, 2516.

way of filling up blanks in a form", and that "no man in the City would take notice of 'eight' not being close to the next word". That was not a case of banker and customer, but it can hardly be negligence not to be more careful than the average City man.

At the other extreme is the *Macmillan Case* itself, where the space for the amount in writing was left absolutely blank.

Indeed, as will be presently shown, there the judgments of two law lords proceeded mainly, that of LORD FINLAY, C., alternatively, on a totally different ground, not applicable generally; and it is most fortunate that the case did not go off on that basis, but established the broad and vital principles above stated.

Although the *Macmillan Case* naturally dealt only with the form of the cheque, it is conceived that the doctrines of negligent ignorance, attributed knowledge, and unreasonable trust in subordinates would, so far as they are recognised in English law, be applicable in suitable cases to the question of raised cheques. The one case in which a similar plea was raised, *Slingsby v. District Bank, Ltd.* (j), tried by FINLAY, J., failed to support the plea. This was a case where a cheque was prepared by the solicitor to a trust, signed by the trustees and handed back to the solicitor for the purpose of being delivered to the payees. In fraud of the trust, the solicitor added after the name of the payees the name of his firm, viz., 'per Cumberbirch & Potts', indorsed the cheque 'Cumberbirch & Potts' and paid it into an account in which he was personally interested. Being, apart from the drawers' signatures, entirely in the handwriting of the solicitor, the cheque showed no sign of having been tampered with and was (so far as this point is concerned) innocently and reasonably paid by the defendant bank. FINLAY, J., held that it was not yet the practice to draw a line after the payee's name on cheques so as to make it difficult for the blank space to be utilised in fraud of the drawer, and that, that being so, there was no negligence on the part of the drawers. This issue was, however, confused by the fact that the indorsement was irregular, which in itself was sufficient to deprive the defendant bank of its case.

The *Macmillan Case* must not be pressed so as to impugn the principle that the banker cannot set up an estoppel against the customer where his own negligence has contributed to the loss, as where the alteration was obvious or discoverable by the exercise of reasonable care, or where the state of the cheque raised fair suspicion of its having been tampered with and payment was made without inquiry (k). For certain purposes, the important feature of the *Macmillan* judgment is its vindication and exposition of the relationship and mutual duties of

(j) [1932] 1 K.B. 544; Digest Supp.

(k) *Scholey v. Ramsbottom* (1810), 2 Camp. 485; 3 Digest 215, 543.

banker and customer, at that time practically in suspension, now operative, not only with regard to raised cheques, but in many other phases of banking law.

Estoppel on inchoate instruments

There is, however, another aspect of the case. Since *Lloyds Bank, Ltd. v. Cooke (l)*, it has been generally recognised that estoppels with regard to bills and cheques are not confined to the specific cases provided for by the Bills of Exchange Act, as in s. 20 (m); but by virtue of s. 97 (2) (n) or otherwise, include all estoppels known to the common law (o). By this importation of the common law, the limitation in s. 20 to the holder in due course, the source of so much difficulty in *Lloyds Bank, Ltd. v. Cooke*, was got over. The contention of MOULTON, L.J., in that case that a named payee could be holder in due course was finally disapproved in *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd. (p)*.

But it was commonly assumed that even the common law went no further than the person who takes a negotiable instrument as a holder or transferee, not necessarily by negotiation from a prior party. Thus the payee would be included, the previously doubtful case under s. 20.

Moreover, the prevalent idea was that the common law dealt only with the plain blank stamped paper delivered to be filled up as a bill or note for the purpose of negotiation.

The *Macmillan Case* has greatly expanded both the range and the applicability of this doctrine. The document in that case was not strictly a blank stamped piece of paper, not what would usually be termed a blank cheque. True, there was nothing at all in the space allotted to the amount in writing, but there was the '2' in the space for figures.

Section 9 (2) says :

"Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable."

That does not apply here; there was no sum expressed in words, therefore no discrepancy, and no sum denoted in words to be payable. Still, it shows that the words are the dominating factor. Possibly this was in the minds of the House of Lords, for they treated the absence of any sum expressed in words as putting the cheque on the footing of a blank cheque, the blank stamped paper which is the ideal starting point of estoppel, whether under common law or the Bills of Exchange Act.

LORD FINLAY says (q) :

(l) [1907] 1 K.B. 794; 6 Digest 74, 587.

(m) 2 Halsbury's Statutes 43.

(n) 2 Halsbury's Statutes 80.

(o) Cf. *Talbot v. Von Borst*, [1911] 1 K.B. 854; 6 Digest 136, 900.

(p) [1926] A.C. 670; Digest Supp.

(q) [1918] A.C., at p. 811.

"But further, it is well settled law that if a customer signs a cheque in blank and leaves it to a clerk or other person to fill it up, he is bound by the instrument as filled up by his agent. This has been suggested as the real ground for the decision in *Young v. Grote*."

His Lordship says he does not think it was the real ground, and proceeds, at p. 812 :

"But the principle is thoroughly established, and it seems to me to apply to the facts of the present case. . . . On this ground also, which on my view of *Young v. Grote* is independent of that decision, I am of opinion that this appeal should be allowed."

LORD SHAW said it was a very near approach to a blank cheque.

LORD HALDANE took the same line and laid considerable stress on the provisions of s. 20 relating to cheques wanting in any material particular. LORD PARMOOR's judgment is also founded on the general estoppel basis rather than on any breach of duty between banker and customer.

It seems to have been taken for granted that, for the purpose of estoppel, the paying banker was in the same position as a transferee, and there appears no reason why it should not be so. The cheque, so far as the signature goes, is a mandate which the paying banker is bound to obey, the customer must be taken to contemplate its effect on him at least as much as on a transferee, and on this basis he would seem entitled to at least equal protection.

It would be presumptuous to criticise the treatment of the cheque in the *Macmillan Case* as being tantamount to a blank cheque. As LORD SHAW said, it was a very near approach to one, and the regarding it as one seems a very reasonable extension of the stricter rule. There are several cases, which are somewhat analogous, where a marginal note has been put on a bill, specifying a sum differing from that expressed in the body of the bill, and such marginal note has been disregarded (r).

Section 20

The application of s. 20 (s) appears more doubtful. Whether the cheque be treated as the result of signing a blank stamped paper or a bill wanting in a material particular, the instrument, if not filled up in accordance with the authority given and within a reasonable time, is only valid and effectual in the hands of a holder in due course (see the section), which the paying banker clearly never was. Even the wide interpretation put on s. 20 in *Macdonald (Gerald) & Co. v. Nash & Co.* (t), does not cover this.

There are several things to be noted about this apparently new development. The estoppel is in no way dependent on the existence of a duty or the breach of it ; it is not a question

(j) *Garrard v. Lewis* (1882), 10 Q.B.D. 30 ; 6 Digest 72, 581.

(s) 2 Halsbury's Statutes 43.

(t) [1924] A.C. 625 ; Digest Supp.

of negligence, save possibly in the sense of a man's duty to the public.

It may seem a contravention of LORD BOWEN'S well-known *dictum* about a negotiable instrument not being a gun, or a dangerous animal, but one deduction from this part of the case is that if a man chooses to put his hand to an inchoate or incomplete negotiable instrument and hands it to someone else either to negotiate or get money on, he is responsible to anybody who is injured by the agent's misuse or abuse of the instrument. In substance, he has let loose an animal or a contrivance, potentially, if not intrinsically, dangerous to his fellow creatures. It may be suggested that, in the above proposition, the factor of deputing the filling-up, included by LORD FINLAY, has been omitted. But there was no evidence or suggestion in the *Macmillan Case* that Arthur, the partner who actually signed the cheque, gave any authority to the fraudulent clerk to fill it up. He was in a hurry and simply did not notice that it was not filled up for £2. The position, therefore, appears fairly stated as it is; the handing the, in fact, inchoate instrument to another person for the purpose of negotiation or getting money must be taken to involve authority to complete it, whether the signatory knows it is incomplete or not.

Another construction is that the emission of an inchoate or incomplete negotiable instrument is a holding-out of it as completed, even when completed wrongfully. If that be taken as the fundamental principle, the issuer's knowledge or ignorance of the incompleteness must, again, be regarded as immaterial. On either theory, the result appears an advance on previous decisions, which seem to have postulated knowledge, if not intention, as an element of liability, where inchoate or incomplete instruments were concerned. It is, however, essential that the inchoate instrument should be delivered for negotiation or to get the money; if, as in *Smith v. Prosser* (u), it were merely handed over for safe keeping, awaiting further instructions, and the custodian wrongfully filled up and dealt with it, neither transferee nor drawee could avail himself of either the inchoate instrument or the holding-out line of argument. If the drawee were the banker, as in a cheque, he would have to rely on the relation of banker and customer, which would probably not suffice. There are circumstances which would fully justify a reasonable man in leaving such an instrument in the hands of a trusted friend or subordinate, to be used if occasion required.

The consequences of this pronouncement in the *Macmillan Case*, especially the importation of s. 20 into the matter, are far-reaching, but it is not easy to prognosticate the conditions and facts which will bring it into play. Suffice it that the principle is established.

Amount chargeable

In *Colonial Bank of Australasia, Ltd. v. Marshall* (v), as in the earlier raised cheque cases, the customer only took objection to being charged with the excess over the original amount. In the *Macmillan Case*, the original sum was negligible, if existent, and the point was not raised. There are, however, expressions in other cases which, taken strictly, would seem to suggest a doubt as to the banker's right to debit even the original amount, if he is precluded from debiting the excess :

" . . . any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument." (w)

" The question is whether the alteration introduced made it a different note ; if it be material, it is a different note." (y)

" But it is further to be considered whether the crossing was part of the cheque, so that the erasure of it would amount to a forgery of another and different cheque from that which the plaintiff drew ; for if it had that effect, the plaintiff never drew the cheque that was paid, and the banker cannot claim credit for it." (z)

" If unfortunately he (the banker) pays money belonging to the customer upon an order which is not genuine, he must suffer ; and to justify the payment, he must show that the order is genuine, not in signature only, but in every respect." (a)

See, however, this latter case distinguished in case of accidental destruction of numbers on a note or bill (b).

Material alteration

The alteration of the amount is, of course, material (c), and under that section avoids the bill or cheque. The right given in the proviso to utilise the bill as if unaltered and enforce payment according to its original tenour, where the alteration is not apparent, is confined to a holder in due course, and does not extend to the banker.

" An alteration in a bill is apparent within s. 64 if it is of such a kind that it would be observed and noticed by an intending holder scrutinising the document which he contemplated taking, with reasonable care." (d)

On the other hand, in *Imperial Bank of Canada v. Bank of Hamilton* (e), the Judicial Committee treat a raised cheque as having been a good cheque for the original amount ; but the authority is not strong or direct.

(v) [1906] A.C. 559 ; 3 Digest 233, 643.

(w) *Master v. Miller* (1791), 4 Term Rep. 320.

(y) *Knill v. Williams* (1809), 10 East, 431 ; 6 Digest 375, 2471.

(z) *Simmons v. Taylor* (1857), 2 C.B.N.S., at p. 539 ; see also p. 541 ; affirmed (1858), 4 C.B.N.S. 463 ; 3 Digest 230, 630.

(a) *Hall v. Fuller* (1826), 5 B & C., at p. 757 ; 3 Digest 233, 645 ; see also *Suffall v. Bank of England* (1882), 9 Q.B.D. 555 ; 3 Digest 130, 56.

(b) *Hong Kong and Shanghai Bank v. Lo Lee Shi*, [1928] A.C. 181 ; Digest Supp.

(c) Cf. Bills of Exchange Act, 1882, s. 64 ; 2 Halsbury's Statutes 68.

(d) *Per SALTER, J., Woollatt v. Stanley* (1928), 138 L.T. 620 ; Digest Supp.

(e) [1903] A.C. 49 ; 3 Digest 233, 646.

Though it would be unreasonable for a customer to question the payment up to the original amount, it must be confessed that in the light of the above cases and their application to the relation of banker and customer, the banker's position does not seem over-secure, even as to the original amount.

Contentions for banker

It may be contended that the avoidance by material alteration obtains in its extreme rigour only against a party setting up the instrument either as ground of action or direct means of defence. But that is not consonant with the cases above cited, and is only most vaguely deducible from *Suffell v. Bank of England*. An alteration is not the less effective because, on the face of it, it is authorised. The following extract from the "Journal of the Institute of Bankers" for April 1929, Vol. 1, p. 174, shows this and reveals a new and somewhat ingenious method of fraud with regard to cheques :

" A man, B, who claimed to have a banking account in the country, when on a visit to London expressed a wish to obtain change for a cheque for a small amount, say, £10, and asked a London acquaintance, X, to endorse the cheque in order that he might cash it at X's London bank. X complied with the request, and B then altered the amount to £100, duly initialing or signing the alteration, and X's banker gave him the money for it, relying on X's endorsement.

The cheque was returned unpaid with the answer ' account closed ', and B disappeared. On calling upon X to reimburse them, the bank was not unnaturally informed that X repudiated liability for any amount in excess of £10. In law X was not liable even for the original amount of the cheque, £10, for, by s. 64 of the Bills of Exchange Act, a bill which is materially altered without the assent of *all* the parties liable on the bill, including in this case the endorser, is discharged. There is a proviso that, where a bill is in the hands of a holder in due course, and the alteration is not apparent, the holder may avail himself of the bill as if it had not been altered, and may enforce payment of the original amount, but in the case described above the alteration was open and apparent, and the proviso gave the bank no protection. . . . "

There were, apparently, no subsequent legal proceedings, but there can be no question but that the conclusion arrived at by the Journal is correct, and X's bank was fortunate if X let it debit him with the £10.

Possibly the banker's best contention would be that where it is a question of mere unauthorised addition or increase ; where the genuine can be disentangled from the false, the customer's mandate still holds good *pro tanto* : in the same way as LORD ELLENBOROUGH " with the eyes of the law " read the erased but still legible £57 instead of the substituted £66 in *Henfree v. Bromley* (f).

Cases not covered

But this contention, even if maintainable, would not help

in cases where the cheque was so altered as completely to merge its identity and directly contravene the customer's mandate. A crossed cheque opened by 'Pay Cash' and the signature of drawer forged; a post-dated cheque in which the date is altered to an earlier one (g); 'order' altered to 'bearer' and falsely initialed; all these are material alterations which entirely eliminate the customer's mandate. The last instance is a particularly hard one, inasmuch as if the fraudulent person had left the 'order', but forged the indorsement, the banker would be protected by s. 60 (h). See also (*ante*, p. 172), *Slingsby v. District Bank, Ltd.* (i).

This question does not seem affected by the *Macmillan Case*. If, as there, no sum was filled in in writing, the whole raised amount could be debited, under either of the alternative grounds of LORD FINLAY's judgment. If a sum had been filled in but raised, the matter would stand as hereinbefore stated.

Material alteration of promissory note

An unsuccessful attempt was made in Ireland recently by the signatory to a promissory note to avoid liability on the ground that the signature was appended after the completion and issue of the note and therefore constituted a material alteration (j). GAVAN DUFFY, J., held that the alteration was material, but saw "no reason, either in logic or grammar, for making an actual signatory less liable because he was not an original party". He cited *Gardner v. Walsh* (k), which was supported in *Bolster v. Shaw* (l), a Canadian case; but *Re Smith, Ex parte Yates* (m), which is authority for holding an additional signature to be operative as an indorsement, was not referred to.

SECTION 3.—FORGED INDORSEMENT ON DOMICILED BILLS

The third head of forgery involving danger to the banker is forged indorsement on bills accepted payable at his bank. With regard to these there is no statutory protection whatever. Neither s. 60 of the Bills of Exchange Act, nor s. 19 of the Stamp Act, 1853 (n), has any bearing on the question; inasmuch as the bill, even if payable on demand, is not drawn on

(g) Cf. *Vance v. Lowther* (1876), 1 Ex. D. 176; 3 Digest 234, 647.

(h) 2 Halsbury's Statutes 66.

(i) [1932] 1 K.B. 544; Digest Supp.

(j) *Flanagan v. National Bank, Ltd.* (1938), 72 I.L.T. 63.

(k) (1855), 5 E. & B. 83; 6 Digest 377, 2481.

(l) [1917], I.W.W.R. 431; 6 Digest 377, 2479 iii.

(m) (1857), 2 De G. & J. 191; 6 Digest 377, 2482.

(n) 1 Halsbury's Statutes 543.

the banker. The payment is made to the wrong person, and the banker is therefore not entitled to debit his customer (o).

There is no question of inchoate instrument, incomplete instrument, or holding out. The acceptor has no possible means of preventing forged indorsement. The duty of customer to banker applies, however, with full force to the payment of domiciled acceptances, as being definitely the exercise of the functions of a mandatory, and such protection as can be derived therefrom is undoubtedly open to the banker.

Banker's defence : fictitious or non-existing person as payee

The banker's line of defence, if any, against the customer in such cases depends upon certain considerations. If the payee is a fictitious or non-existing person, the banker is discharged and can debit the customer, as having paid the bearer of a bearer bill within s. 7, sub-s. (3) (p). The decisions on this sub-section with regard to cheques, viz., *Vinden v. Hughes* (q), *North and South Wales Bank, Ltd. v. Macbeth* (r), whilst differentiating the case of cheques, have left the bearing of the sub-section on bills as it was established in *Bank of England v. Vagliano Brothers* (s).

On a bill, a real, existing, specific person may, as against the acceptor, be fictitious or non-existing as payee although he be known to the acceptor, who accepted with full intention that such person, either by himself or a transferee by his indorsement, should receive the money, if such person's name was introduced by the drawer, or inserted by a fraudulent person, by way of pretence only and with no intention that he should ever obtain or have anything to do with the bill.

"... whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence . . ." (t).

By whom bill may be so treated

The right to treat the bill as payable to bearer is not confined to a holder, but may be set up by anyone to whose interest it is to do so ; for instance, by a banker who has paid a bill domiciled with him, which was the case in *Bank of England v. Vagliano Brothers*. The knowledge or ignorance of the acceptor as to the fictitious or non-existing character of the payee is immaterial.

(o) *Roberts v. Tucker* (1851), 16 Q.B. 560 ; 3 Digest 234, 648 ; *Bank of England v. Vagliano Brothers*, [1891] A.C. 107 ; 3 Digest 237, 663.

(p) 2 Halsbury's Statutes 39.

(q) [1905] 1 K.B. 795 ; 6 Digest 32, 208.

(r) [1908] A.C. 137 ; 6 Digest 32, 209.

(s) [1891] A.C. 107 ; 6 Digest 31, 205.

(t) *Per* LORD HERSCHELL, [1891] A.C., at p. 153 ; see also pp. 153-4, showing that it makes no difference whether the drawer's name be genuine or forged.

Act of customer

If the customer has by his act accredited the bill with the forged indorsement to the bank, or put upon the bank a risk greater than that involved by the possibility of a forged indorsement on a genuine bill, the customer must bear the loss.

Vagliano's Case

In *Bank of England v. Vagliano Brothers*, *ubi supra*, the drawer's name, as well as that of the supposed payee, was the work of the forger, and the documents were not really bills at all. The House of Lords held that Vagliano, by writing an acceptance on such documents, represented to the bank that, up to that stage at least, they were genuine bills, involving none but the ordinary risk; and that, this representation being in fact untrue, the bank were entitled to be indemnified (u).

So, again, the inclusion of these spurious documents in letters of advice to the bank of bills coming forward for payment was an act of the customer directly tending to mislead the bank, though such letters could not be read as guaranteeing any indorsement.

Rights as agents

A valuable feature in the case is the assertion of the right of bankers, acting as agents for the payment of domiciled bills, to all the protection, consideration and indemnities to which an ordinary agent is entitled as against his principal.

"... a principal who has misled his agent into doing something on his behalf which the agent has honestly done would not be entitled to claim against the agent in respect of the act so done." (w)

"It is not . . . disputed that there might, as between banker and customer, be circumstances which would be an answer to the *prima facie* case that the authority was only to pay to the order of the person named as payee upon the bill, and that the banker can only charge the customer with payments made pursuant to that authority. Negligence on the customer's part might be one of these circumstances; the fact that there was no real payee might be another; and I think that a representation made directly to the banker by the customer upon a material point, untrue in fact (though believed by the person who made it to be true), and on which the banker acted by paying money which he would not otherwise have paid, ought also to be an answer to that *prima facie* case. If the bank acted upon such a representation in good faith and according to the ordinary course of business, and a loss has in consequence occurred which would not have happened if the representation had been true, I think that is a loss which the customer and not the bank ought to bear." (y)

The negligence on the part of the customer spoken of by LORD SELBORNE must, however, be understood as limited to

(u) See, especially, *per* LORD MACNAGHTEN, at pp. 158, 159; *per* LORD HALSBURY, at p. 114.

(w) LORD HALSBURY, at p. 114.

(y) LORD SELBORNE, at p. 123.

negligence directly leading to the loss, or 'enabling' it, in the legal sense of the phrase, to be committed (z).

This duty of taking care is here based on the same ground as in the *Macmillan Case*, namely, the relation of principal and agent. The intervention of forged indorsement, as before stated, is not a matter which the customer can possibly obviate; and if he has not been negligent in other respects, forged indorsement would absolve him from liability to the banker.

Liability to true owner

Apart from any question between himself and his customer, the banker who pays a bill domiciled with him on a forged indorsement is liable to the true owner for conversion of it, the payment being to an unlawful possessor, incapable of giving a discharge (a); there being no protection to the banker analogous to that of s. 60 with regard to cheques.

The banker would, of course, have a theoretical remedy against the person who received the money, if he were the forger or a party to the fraud.

As to the banker's position where the money has been paid to a person who took the bill *bona fide* and for value without notice of the forgery, see 'Money Paid by Mistake'.

SECTION 4.—ADOPTION OR RATIFICATION

One phase of the doctrine of estoppel or adoption, previously referred to, appears applicable to all classes of forgery, and has therefore been reserved for fuller treatment here.

It is sometimes said that a forgery cannot be ratified and that the language of s. 24 of the Bills of Exchange Act, 1882, seems to countenance this view (b). But the true doctrine appears to be confined to this, that public policy forbids a man to extort from another, whose signature has been forged, an undertaking to be responsible as if the signature were genuine, as the price of forbearing criminal proceedings against the forger (c).

Anyway, it is clear that a man may, by his conduct or silence, be estopped from denying his signature or be held to have adopted the forged instrument (d).

Duty to warn of forgery

If a man knows or has reasonable ground for believing that

(z) *Farguharson Brothers & Co. v. King & Co.*, [1902] A.C. 325; 1 Digest 377, 828; *Bank of England v. Vagliano Brothers*, [1891] A.C., at p. 115; 3 Digest 244, 703.

(a) *Smith v. Union Bank of London* (1875), L.R. 10 Q.B., at p. 295; affirmed, 1 Q.B.D., at p. 35; 3 Digest 241, 683.

(b) See *Chalmers on Bills of Exchange*, 10th ed., p. 87.

(c) *Williams v. Bayley* (1866), L.R. 1 H.L. 200; 12 Digest 296, 2443; *M'Kenzie v. British Linen Co.* (1881), 6 App. Cas., at p. 99; 6 Digest 104, 726.

(d) Cf. *Chalmers*, 10th ed., p. 88, and cases there cited, note (r).

his name has been forged on a bill or cheque and that it is about or likely to be presented for payment to a banker, he is bound with reasonable despatch to warn the banker of the fact. If he does not, and the bank's position is thereby prejudiced, he adopts the bill or cheque (e).

The same rule would seem to apply when the signature has been fraudulently obtained (f).

Not confined to customers

The above doctrine is not confined to customers. Where the relation of banker and customer exists, there is no doubt the more tangible ground of duty arising out of the relation.

In *M'Kenzie v. British Linen Co.* there was no relation of banker and customer. M'Kenzie was no customer of the bank. It is specially stated in the head-note that the bank had had no previous dealings with A., i.e., M'Kenzie, so also at p. 83 and p. 96; and the judgments in no way hinge on or even suggest such relation. In *Ewing (William) & Co. v. Dominion Bank* there was no relation of banker and customer. In *Ogilvie v. West Australian Mortgage and Agency Corporation, Ltd.*, *ubi supra*, at p. 268, the Judicial Committee say with regard to *M'Kenzie v. British Linen Co.* and similar cases:

"The ground upon which the plea of estoppel rested in these cases was the fact that the customer, being in the exclusive knowledge of the forgery, withheld that knowledge from the bank until its chance of recovering from the forger had been materially prejudiced."

So far as *M'Kenzie v. British Linen Co.* is concerned, the statement that the relation of customer and banker was involved is incorrect, and the case itself contains nothing limiting the principle to that relation: rather the contrary. The position in *Greenwood v. Martins Bank, Ltd.*, was just that indicated in the judgment of the Judicial Committee, above quoted.

Moral duty

The obligation, outside any contractual relation, is based on a duty formerly hardly recognised as a moral one, but now elevated to a legal one. The obligation and duty require that a business man, or even one unconnected with business, must not willingly allow a fellow man, or even a body corporate, to

(e) *M'Kenzie v. British Linen Co.* (1881), 6 App. Cas. 82, particularly pp. 92, 101, 109; 6 Digest 104, 726; *Ogilvie v. West Australian Mortgage and Agency Corporation, Ltd.*, [1896] A.C. 257, 270; 3 Digest 231, 634; *Ewing (William) & Co. v. Dominion Bank*, [1904] A.C. 806; 3 Digest 236, 661; *Leather Manufacturers' National Bank v. Morgan* (1885), 117 U.S. 96 (Supreme Court of the United States); *Morison v. London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356; 3 Digest 242, 690; *Greenwood v. Martins Bank, Ltd.*, [1933] A.C. 51; Digest Supp.

(f) *Midland Bank v. Shrewsbury's (Lord) Trustees* (1924), Times, March 18th.

be prejudiced by the fraudulent use of a forged instrument to which he has set, or appears to have set, his hand, a "duty required of him by the rules of fair dealing between man and man (g)."

Form of forgery immaterial

It is immaterial how the forged signature be utilised on the bill or cheque, whether as that of drawer, acceptor, or indorser, and there seems no need to confine the doctrine to signatures. It was applied to genuine cheques with fraudulently raised amounts in two of the American cases previously cited with reference to the pass book; and though the English cases have had to do with forged signatures, the abuse of a genuine signature by means of forgery presents no distinctive feature.

Constructive knowledge

Actual knowledge of the forgery is probably not essential. LORD SELBORNE, in *M'Kenzie v. British Linen Co.* (h), speaks of "reasonable ground to believe", and the judgments in the American cases (j) include convincing reasons for the conclusion, there arrived at, that, for this or a like purpose, a man must be treated as in possession of knowledge which, but for his own negligence, he could not have failed to acquire (k).

Prejudice or injury

Mere silence, without resulting injury or prejudice to the bank, does not work estoppel or adoption (l). The prejudice or injury to the bank, resulting from the customer's or other person's silence, which will estop him from disputing his signature or constitute adoption by him of the bill or cheque, is not confined to payment thereof. The customer or other person will be equally bound if, by his silence, the bank are precluded from the opportunity of protecting themselves against subsequent forgeries, if any, by the same person, or lose the chance of taking proceedings, civil or criminal, against the forger, as by his escaping out of the jurisdiction in the interval. And it is immaterial whether civil proceedings against the forger would have been likely to result in

(g) *Ogilvie v. West Australian Mortgage and Agency Corporation, Ltd.*, [1896] A.C., at p. 269; 3 Digest 231, 634; *Ewing (William) & Co. v. Dominion Bank*, *supra*; for report below, see Canada Supreme Court Reports, vol. xxxv, 133, where the judgments of the majority are based solely on this view.

(h) (1881), 6 App. Cas., at p. 92.

(j) See *ante*, 'The Pass Book'.

(k) Cf. *per* LORD WATSON, in *Scholfield v. Londesborough (Earl)*, [1896] A.C., at p. 543; 6 Digest 384, 2518; *Jacobs v. Morris*, [1902] 1 Ch. 816; 6 Digest 110, 751; *Morrison v. London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356; 3 Digest 242, 690.

(l) *M'Kenzie v. British Linen Co.*, *ubi supra*, at pp. 109, 111, 112.

getting the money back or not (*m*). In the case of *Greenwood v. Martins Bank, Ltd.* (*n*), the forger was the wife of the bank's customer, and the husband would thus have been liable for his wife's tort, so that he could not have succeeded in any event in recovering the money the bank had paid away on the forgeries. This liability of the husband has now been removed by the Law Reform (Married Women and Tortfeasors) Act, 1935 (*o*).

A dictum in *Imperial Bank of Canada v. Bank of Hamilton* (*p*), apparently treating the financial position of the forger as material, is used in another connection and cannot stand against the above authorities.

This principle of estoppel or adoption is particularly valuable to the banker; inasmuch as, when it can be put in force, it affects all cheques previously forged by the same person, though the fraud may only have been discovered with regard to the last of the series.

The banker cannot, of course, set up estoppel or adoption when the loss is attributable, even in part, to his own negligence; as where he has failed to detect an obvious forgery or alteration (*q*). As has been indicated above, however, his negligence must have contributed directly to that loss in respect of which he is setting up estoppel or adoption (*r*).

(*m*) *M'Kenzie v. British Linen Co.* (1881), 6 App. Cas. 82; 3 Digest 236, 658, and Scotch cases cited there at p. 110; *Ogilvie v. West Australian Mortgage and Agency Corporation, Ltd.*, [1896] A.C. 257, 270; 3 Digest 231, 634; *Ewing (William) & Co. v. Dominion Bank*, [1904] A.C. 806; 3 Digest 236, 661; *Leather Manufacturers' National Bank v. Morgan* (1885), 117 U.S. 96; cf. *Knights v. Wiffen* (1870), L.R. 5 Q.B. 660; 21 Digest 312, 1147.

(*n*) [1933] A.C. 51; affirming, [1932] 1 K.B. 371; Digest Supp.

(*o*) 28 Halsbury's Statutes 104.

(*p*) [1903] A.C., at p. 57; 3 Digest 233, 646.

(*q*) Cf. *Critten v. Chemical National Bank of New York* (1902), 171 N.Y. 219.

(*r*) *Greenwood v. Martins Bank, Ltd.*, [1933] A.C. 51; Digest Supp. and ante, p. 274.

CHAPTER 17

THE COLLECTING BANKER

SUMMARY—

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Capital and Counties Bank, Ltd. v. Gordon

The legal conception of the collecting banker enunciated in *Capital and Counties Bank, Ltd. v. Gordon* (a), hereafter referred to as the *Gordon Case*, was that of a mere conduit pipe, receiving the cheque from the customer, presenting it and receiving the money for the customer, and then, and not till then, placing it to the customer's credit, exercising functions strictly analogous to those of a clerk of the customer sent to a bank to cash an open cheque for his employer (b). In that case the House of Lords held that the bank had not acted as such conduit pipe, had not received payment for the customer and so had lost the protection of s. 82 (c) for certain crossed cheques of which they had received payment.

That judgment of the House of Lords, the grounds on which it is, or was supposed to have been, based and its effect, have been matter of discussion, differing judicial views, doubts as

(a) [1903] A.C. 240 ; 3 Digest 240, 676.

(b) *Ibid.*, at p. 246.

(c) 2 Halsbury's Statutes 76.

to the banker's position, and legislation, which last, according to one school of disputants, was unnecessary, according to the other, produced results satisfactory to the banker, but, admittedly, somewhat anomalous.

Though the judgment dealt mainly with s. 82, it really concerns the banker with regard to uncrossed cheques as well. The reason why the House of Lords held the bank not to have received payment for the customer, but for itself, was that it had credited the customer with the face value as cash on receipt and before clearing. The whole controversy is whether that meant the mere entry as 'cash' in the bank's own books, or such entry coupled with an undertaking to the customer that he could draw against them at once; whether, in short, a banker by crediting 'as cash' in his own books, becomes holder for value or remains collecting banker. As to this, see *post* (p. 316), 'Receives payment for a customer'.

If the banker is not simply collecting, if he takes the uncrossed cheque as holder for value, he occupies exactly the same position as any other person who so acquires the cheque. If there is forged indorsement he is liable to the true owner and acquires rights only against indorsers, if any, subsequent to the forgery. If there is no question of forged indorsement, but only defective title or no title in the customer, then the banker is holder in due course with good independent title against everybody, entitled to hold, and sue all prior parties on, the cheque.

Nor is there anything in the *Gordon Case* to prevent a banker's asserting precisely the same rights with regard to crossed cheques taken by him as holder for value. If there is no question of forged indorsement, and the cheque is not crossed 'not negotiable', the banker can claim all the rights of a holder in due course. The question of the bearing of the amending Act of 1906 will be dealt with later, p. 330.

What the *Gordon Case* primarily did, or was understood to do, was to deprive bankers of protection against the true owner with regard to crossed cheques with forged indorsement, or to which the customer had no title or a defective title, where such cheques had been credited as cash before receipt of the money. The protection so denied was, of course, claimed under s. 82.

It being the practice of very many banks so to deal with cheques, crossed as well as open, the decision created a good deal of uncertainty and business complication. The possible alternative advantage of the position of holder for value was for the time being left in the background.

Very soon the Courts refused to accept the view of the *Gordon Case* above expressed, holding that to deprive the banker of protection there must be something more than mere crediting as cash in the bank's own books, some undertaking or understanding with the customer that he could draw against

the cheques at once (*d*). But doubts still continued. Various devices were adopted by some banks, such as suspense accounts or crediting cheques as 'sundries' instead of 'cash', which were maintained by some banks notwithstanding the passing of the Act of 1906. The government brought in amending bills in 1903, 1904 and 1905, which were successively dropped; and finally in 1906 obtained the passing of the Bills of Exchange (Crossed Cheques) Act, 1906 (*e*). The operative part of this Act is contained in s. 1, and enacts:

"A banker receives payment of a crossed cheque for a customer within the meaning of s. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

Save for neutralising the actual or supposed effect of the *Gordon Case* by enacting that mere crediting as cash shall not deprive the banker of protection under s. 82, this Act imports no alteration in that section, and protection is still dependent on its conditions being fulfilled by the banker.

However, in *Underwood (A. L.), Ltd. v. Bank of Liverpool: Same v. Barclays Bank, Ltd.* (*f*), LORD JUSTICE ATKIN's view was acquiesced in by BANKES, L.J., and, presumably, by SCRUTTON, L.J., to the effect that neither the *Gordon Case* nor the 1906 Act lays down the rule, judicial or statutory, that if a bank credits a cheque at once in its books, that fact, without more, makes the bank a holder for value. Whatever may be said of the 1906 Act, it is difficult to follow the mind of the Court in its statement concerning the *Gordon Case*. That part of the judgments dealing with the point of crediting as cash allows of no misunderstanding; they permit of no exception to the general rule which ATKIN, L.J., denies, and which LORD BIRKENHEAD, L.C., recognised as the position in *Sutters v. Briggs* (*g*): "It is, as is well known, usual for bankers, in the case of substantial customers at least, to constitute themselves holders in due course, as was the case in *Capital and Counties Bank, Ltd. v. Gordon*, the result of which case led to the passing of the Bills of Exchange (Crossed Cheques) Act, 1906". The true position is that the *Gordon Case* was wrongly decided, and that ATKIN, L.J., in *Underwood's Case* was correctly stating the law, but misapplying the *Gordon* decision.

Bills of Exchange Act, s. 82 (*h*)

Section 82 of the Bills of Exchange Act, 1882, is as follows:

"Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to

(*d*) See *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K.B. 465; 3 Digest 240, 677; *Bevan v. National Bank, Ltd.* (1906), 23 T.L.R. 65; 3 Digest 240, 678.

(*e*) 2 Halsbury's Statutes 81.

(*f*) [1924] 1 K.B. 775; Digest Supp.

(*g*) [1922] 1 A.C. 1, at p. 15; 25 Digest 418, 213.

(*h*) 2 Halsbury's Statutes 76.

himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Unless the banker can bring himself within the conditions formulated by this section, he is left with his common law liability for conversion or money had and received, in the event of the person from whom he takes the cheque having no title or a defective title thereto.

Modification of section

One modification, and one only, must be engrafted on the section. If the receipt of the money is protected by the section, the protection covers all prior dealings with the cheque. True, the section specifically deals only with the receipt of the money, and it has been contended, and even held, that the taking of the cheque from a person who had no right to it, or some formal, preliminary act, such as the banker stamping his name across it, was an independent conversion, against which the banker was not protected, though he ultimately brought himself strictly within the section by receiving payment only for the customer. The ineptitude of the wording must be supplemented by a common-sense reading in order to avoid a patent absurdity. As LORD MACNAGHTEN says in the *Gordon Case* (j) :

"The only question is, did the banks receive payment of these cheques for their customer? If they did, it is obvious that they are relieved from any liability which, perhaps, might otherwise attach to some preliminary action on their part, taken in view and anticipation of receiving payment. The section would be nugatory, it would be worse than nugatory, it would be a mere trap, if the immunity conferred in respect of receipt of payment, and in terms confined to such receipt, did not extend to cover every step taken in the ordinary course of business and intended to lead up to that result."

The same has been held in subsequent cases which, in view of this authoritative pronouncement, it seems unnecessary to cite. It was fully recognised in *Morison v. London County and Westminster Bank, Ltd.* (k).

But with this modification every clause of the section must be fulfilled in order to entitle the banker to the protection it confers.

CLAUSE 1.—'IN GOOD FAITH AND WITHOUT NEGLIGENCE'

The protected case is where

"a banker in good faith and without negligence receives payment".

If it were only the receipt of payment which had to be in good faith and without negligence, the section, from the true

(j) [1903] A.C. 240, at p. 244; 3 Digest 240, 676.

(k) [1914] 3 K.B. 356; 3 Digest 242, 690.

owner's point of view, would be 'nugatory, worse than nugatory, and a mere trap'. The obligation and the protection must be co-relative and co-extensive. If the words 'receives payment' are to be read as involving protection to the banker for all preliminary operations leading up to the receipt of the money, the condition precedent to that protection, viz., that the banker shall act in good faith and without negligence, must cover the same ground.

Moreover, the ordinary mind fails to visualise a condition of things in which a banker could take a crossed cheque negligently or in bad faith, present it negligently or in bad faith, and yet receive the money for his customer in good faith and without negligence.

One must not therefore read the *dictum* of the Privy Council in *Commissioners of Taxation v. English, Scottish and Australian Bank (I)*, as seriously impugning this obvious proposition. At p. 688, their Lordships, after pointing out that the words of the section are 'without negligence receives payment', say :

"It is not a question of negligence in opening an account, though the circumstances connected with the opening of an account may shed light on the question of whether there was negligence in collecting a cheque."

As will be seen hereafter, the opening of an account without inquiries has been treated in the High Court as sufficient of itself to fix a bank with negligence under s. 82.

If the *dictum* of the Privy Council is only directed to this one point, it may be left as a matter of dissentient opinion ; if it implies that the *punctum temporis* where negligence becomes material is that of the receipt of the money, one can only respectfully differ.

The whole transaction, then, from the taking of the cheque to the receipt and disposition of the money, must be in good faith and without negligence.

The question of good faith does not require consideration. Its existence on the part of the banker is presumed throughout these pages.

A. WHAT CONSTITUTES NEGLIGENCE

The transaction must be without negligence. The question of what constitutes legal negligence in matters of this sort is one on which lawyers and bankers are seldom agreed.

The banker maintains that the exigencies and pressure of business make it physically impossible effectively to adopt all the precautionary measures which the law seeks to impose upon him. The attitude of the law is that typified by LORD BRAMWELL, who used to say that he was constantly told that banking could

not go on if particular conditions and obligations were imposed on bankers, but that he invariably found that banking did nevertheless go on and flourish. Where a jury have to deal with the question, the natural tendency of each jurymen is to view the matter as if he were himself the plaintiff, and it was his own money that was at stake. So that in any case with a jury the banker must be prepared to find the standard of care required of him put somewhat higher than he might consider reasonable.

Negligence in this section is artificial

It should be noticed that the importation of negligence at all into this section is, in a sense, an anomaly. There can be no negligence without a duty (*m*). There is no contractual relation between the collecting banker and the true owner, giving rise to a duty on the part of the former to the latter. The banker's only contractual obligation is to his own customer; and conduct beneficial to the customer at the expense of the true owner is no breach of that duty.

The true exposition of the matter is that given by DENMAN, J., and the Court of Appeal in *Bissell & Co. v. Fox Brothers & Co.* (*n*). The duty is a purely statutory one imposed on the banker in favour of the true owner, and the negligence consists in the disregard of his interests, apart from those of the customer.

Breach of implied duty to true owner

The assumption of this duty and liability to a stranger must be regarded as part of the price paid by bankers for protection under s. 82. It is from the standpoint, then, of the true owner that all questions of negligence under this section must be viewed.

It would be futile to try and formulate particular conditions or circumstances which might or might not establish negligence in this connection. Broadly speaking, the banker must exercise the same care and forethought in the interest of the true owner, with regard to cheques paid in by the customer, as a reasonable business man would bring to bear on similar business of his own. This formula was approved by SANKEY, L.J., in *Lloyds Bank, Ltd. v. Chartered Bank of India, Australia and China* (*o*). In *Underwood (A. L.), Ltd. v. Bank of Liverpool* (*p*), BANKES, L.J., adopts the test suggested by LORD DUNEDIN in *Taxation Commissioners v. English, Scottish and Australian Bank* (*q*), where he says that

(*m*) *Scholfield v. Londesborough (Earl)*, [1896] A.C. 514; 6 Digest 384, 2518; *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K.B. 489; 36 Digest 32, 181.

(*n*) (1884), 51 L.T. 663; varied (1885), 53 L.T. 193; 3 Digest 241, 684.

(*o*) [1929] 1 K.B., at p. 69; Digest Supp.

(*p*) [1924] 1 K.B. 775; Digest Supp.

(*q*) [1920] A.C. at p. 689; Digest Supp.

the bank's action must be in accordance with "the ordinary practice of bankers".

In *Lloyds Bank, Ltd. v. Chartered Bank of India, Australia and China* (r), SANKEY, L.J., approved the view taken by BAILHACHE, J., in *Ross v. London County, Westminster, and Parr's Bank, Ltd.* (s), that he must attribute to the clerks and cashiers of the defendant bank the degree of intelligence and knowledge ordinarily required of persons in their position to fit them for the discharge of their duties, but that no microscopic examination of cheques paid in for collection was necessary. "It is not expected", he said, "that officials of banks should also be amateur detectives." In the same case, SCRUTTON, L.J., said that "to require a thorough inquiry into the history of each cheque would render banking business impracticable".

Difficulty of divided duty

The peculiar difficulty lies in the divided duty of the banker towards the true owner and his own customer, and the possible clashing of their interests.

It might be an awkward matter for the banker to manifest suspicion of his own customer; but if he refrained from acting on such suspicion, he might easily render himself liable to the true owner, as having neglected his duty to him. But, as SCRUTTON, L.J., said in *Underwood's Case*, *ubi supra*, "If banks for fear of offending their customers will not make inquiry into unusual circumstances, they must take with the benefit of not annoying those customers the risk of liability because they do not inquire".

Some phases of duty to the true owner have been established by decision.

Duty of collecting banker to verify indorsement

It was, at one time, a common belief among bankers that the collecting banker is not concerned with the indorsement on an order cheque.

The omission, however, to see that such indorsement is in order, at least ostensibly, has been distinctly recognised as negligence on the part of the collecting banker. In *Bavins, Junr. and Sims v. London and South Western Bank* (t), the Court of Appeal held the collecting bank guilty of negligence in not detecting that an indorsement did not correspond with the name of the payee, though the discrepancy had apparently escaped notice even in the Court below. In *Bissell & Co. v. Fox Brothers & Co.* (u), and other cases, Courts have held that a *per pro.* indorsement put the collecting bank on inquiry,

(r) [1929] 1 K.B. 40; 33 Com. Cas. 306; Digest Supp.

(s) [1919] 1 K.B. 678, at p. 685; Digest Supp.

(t) [1900] 1 Q.B. 270; 3 Digest 243, 693.

(u) (1884), 51 L.T. 663; varied (1885), 53 L.T. 193; 3 Digest 241, 684.

which it could not do if they were not bound to look at the indorsement. In *Turner v. London and Provincial Bank, Ltd.* (w), the fact that indorsements on two cheques payable to different persons were in the same handwriting was held negligence in the collecting banker. And, apart from authority, verification of the indorsement of an order cheque paid in for collection would seem a proper matter of ordinary business routine, if only to avoid delay and the necessity of returning it if the indorsement had been casually omitted or made in irregular form. It is plainly a case where the plea of pressure of business should not be admitted.

Section 25 of the Bills of Exchange Act (y) enacts that

“A signature by procuration operates as notice that the agent has but a limited authority to sign. . . .”

It was laid down in *Morison v. London County and Westminster Bank, Ltd.* (z), that s. 25 and s. 82 are independent; that the former has no bearing on the latter. Section 25 applies to rights and liabilities while a bill is current; s. 82 to rights and liabilities after it has been discharged. The contrary has been held in cases earlier in date and, more recently, by ATKIN, L.J., in *Midland Bank, Ltd. v. Reckitt* (a), *Morison's Case* being overruled on this point; but this view of s. 25 affords no protection where, through negligence or otherwise, s. 82 is inapplicable. The real significance and efficiency of this form of indorsement in the case of the collecting banker is as a matter for consideration in the question of negligence (b). Any signature which purports to be put on by delegated authority should be for this purpose regarded as a signature by procuration; the fine distinctions which have been drawn between ‘per pro.’ and ‘for’ or ‘pro.’ appear irrelevant in this connection. The signature in *Midland Bank, Ltd. v. Reckitt* was that of an attorney drawing on behalf of his principal. Referring to the judgment of LORD READING, C.J., in *Morison's Case*, ATKIN, L.J., said:

“It seems to be suggested . . . that the operation of this section was limited to the time before the instrument was honoured, but that after a bill so signed in excess of authority has been honoured s. 25 did not confer a right to recover the proceeds. If the words used meant to mark off a definite period within which alone the section affects legal rights, I see no grounds for such a distinction. The effect of the

(w) (1903), “Legal Decisions Affecting Bankers”, vol. ii, p. 33; “Journal of Institute of Bankers”, vol. xxiv, p. 220; 3 Digest 242, 688.

(y) 2 Halsbury's Statutes 46.

(z) [1914] 3 K.B. 356; 3 Digest 242, 690.

(a) [1933] A.C. 1; Digest Supp.

(b) *Morison v. London County and Westminster Bank, Ltd.*, *ubi supra*; cf. *Crumplin v. London Joint Stock Bank, Ltd.* (1913), 109 L.T. 856; 3 Digest 242, 689, where PICKFORD, J., intimated that ‘per pro.’ did not necessarily put the collecting banker on inquiry and that he did not think that COLERIDGE, J., in *Morison's Case*, meant to convey that he thought so either.

statute is to give notice of limited authority on the face of the document, and this operates as and when the document is negotiated or delivered. The legal consequence of such notice may be to prevent the holder who obtains payment from supporting his right to have received payment. The case of *Reckitt v. Barnett, Pembroke and Slater, Ltd.* (c) is a good instance. The rights in respect of a bill after payment are no doubt matters of special consideration; but whether before or after payment, the fact that the bill contains on the face of it notice of limited authority to place on it the particular signature continues to be a fact affecting *pro tanto* the rights of the parties both before and after payment. What effect, if any, such notice has on an intermediate holder for value it is unnecessary to discuss."

Bills executed by companies

It would seem that all executions of bills, notes, or cheques in the name of or on behalf of a joint stock company, should be regarded as signatures by procuration. Section 30 of the Companies Act, 1929 (d), treats all such documents as made, accepted, or indorsed on behalf of the company, whether the execution be in the name of the company or expressly stated to be on its behalf or account.

Section 24 (e), which deals with forged and unauthorised signatures, raises considerable difficulty with regard to signatures authorised for one purpose but employed for another. In *Morison v. London County and Westminster Bank, Ltd.* (f), it was decided that a signature which was authorised for one purpose could not become a forgery if utilised for another. What was not a forgery *quoad* the paying banker could not be one as against the collecting banker.

That case dealt only with the Forgery Act, 1861. But one of the recent cases, hereinbefore referred to under the heading 'Special Customers, Joint Stock Companies', by importing, as it does, the Forgery Act, 1913, with the interpretation of the words 'false statement', there used in a perfectly different connection, as including the use of any form of deputed authority signature by a company official, imputedly, if not actually, qualified so to sign for company purposes, when that signature is affixed with fraudulent intent, such intent being deduced from the subsequent utilisation of the instrument, as by payment into private account, if accepted, puts a different complexion on the question. The doctrine would seem to apply equally to the word 'unauthorised' in s. 24 of the Bills of Exchange Act (e), but this seems immaterial. In any future case of this sort we may have the provisions of s. 35, sub-s. 1, of the Criminal Justice Act, 1925 (g), imported, and such cases as that of *R. v. Kupferberg* (h), decided in 1918, on special emergency legislation, cited as authority (j). The cases above referred to also involve closer

(c) [1929] A.C. 176; Digest Supp.

(e) 2 Halsbury's Statutes 46.

(g) 11 Halsbury's Statutes 417.

(j) Cf. *ante*, 'Forgeries'.

(d) 2 Halsbury's Statutes 791.

(f) [1914] 3 K.B. 356; 3 Digest 242, 690.

(h) (1918), 34 T.L.R. 587.

inquiry into the organisation of the company and the official's actual or implied authority to sign on its behalf.

In *Underwood's Case*, SCRUTTON, L.J., distinguishes between cases where representative signature is obviously used for private ends, as by payment into a private account, and cases where use is ambiguous, as by negotiation, the former being the more suspicious. The collecting banker has no possible means of knowing who are authorised to draw or indorse for a company not his customer. Where there is anything like collection in the transaction, the Courts have a tendency to find collection rather than negotiation, and either on this new doctrine of forgery, or on the extended views now prevailing as to notice or putting on inquiry, the negotiation position is not likely to afford the collecting banker much help. See also *Lloyds Bank, Ltd. v. Chartered Bank of India, Australia and China (k)*.

Fiduciary capacity

The moral is that the practice of collecting banks, already fairly well established, not to collect for private account any cheque which on the face of it or by indorsement bears evidence of being the property of or intended for the benefit of a company, firm or other entity and which is tendered for collection by a person holding or purporting to hold a fiduciary, official or subordinate capacity in such company, firm or entity, whether indorsed by him or not, and whether crossed or not, should be rigorously adhered to in all cases, including the case of a cheque drawn by such company, firm or entity in favour of a named payee or order and tendered for collection, ostensibly indorsed, by a representative of such company, firm or entity, for his private account.

The authorities which emphasise the importance of this precaution and the danger of neglecting it are *Hannan's Lake View Central, Ltd. v. Armstrong & Co. (l)*; *Morison v. London County and Westminster Bank, Ltd. (m)*; *Souchette, Ltd. v. London County, Westminster, and Parr's Bank, Ltd. (n)*; *Ross v. London County, Westminster, and Parr's Bank, Ltd. (o)*; *Underwood (A. L.), Ltd. v. Bank of Liverpool (p)*; *Lloyds Bank, Ltd. v. Chartered Bank of India, Australia and China (q)*; *Midland Bank, Ltd. v. Reckitt (r)*; *Lloyds Bank, Ltd. v. Savory (E. B.) & Co. (s)*.

These last two cases present somewhat different features from the others. In *Midland Bank, Ltd. v. Reckitt*, the bank

(k) [1929] 1 K.B. 40; 33 Com. Cas. 306; Digest Supp.

(l) (1900), 16 T.L.R. 236; 3 Digest 242, 687.

(m) [1914] 3 K.B. 356; 3 Digest 242, 690.

(n) (1920), 36 T.L.R. 195; Digest Supp.

(o) [1919] 1 K.B. 678; Digest Supp.

(p) [1924] 1 K.B. 775; Digest Supp.

(q) [1929] 1 K.B. 40; 33 Com. Cas. 306; Digest Supp.

(r) [1933] A.C. 1; Digest Supp.

(s) [1933] A.C. 201; Digest Supp.

collected for Lord Terrington, Sir Harold Reckitt's attorney, a cheque drawn by him as attorney and paid in in reduction of his overdraft. The power gave the attorney no authority to draw cheques for his own purposes ; a letter addressed to Sir Harold's bankers authorised the attorney to draw 'without restriction'. ROWLATT, J., decided the action for conversion in favour of the bank, but he was reversed by the Court of Appeal, whose decision was approved in the House of Lords. LORD ATKIN held that the bank had notice from the form of the cheque that the money was not Lord Terrington's. He repudiated the reference of LORD READING, C.J., in *Morison's Case*, to the limited operation of s. 25 (t) and could find no authority in the power such as was alleged by the bank to be vested in the attorney.

Lloyds Bank, Ltd. v. Savory (E. B.) & Co. brought to light a breach of duty which, in spite of the evidence submitted, it is safe to say was hitherto unsuspected. The negligence imputed to the bank was that of failing, on the opening of the account to which the cheques in question were credited, to inquire in the one case who the prospective customer's employers were and, in the other, what were the occupation and circumstances of the customer's husband. These omissions, assisted by the fact that information in the possession of the bank as a unit was divided as between branch and branch, were enough to deprive the bank of the protection of s. 82 (u). The House of Lords by a majority confirmed the decision of the Appeal Court, reversing that of ROCHE, J.

This case has certain difficult features. Even if it be thought not to be straining too far the duty of a collecting banker to the true owner of cheques to include inquiry as to the name of the employers on the opening of an account, in cases where, to quote LORD WRIGHT, "the new customer is employed in some position which involves his handling, and having the opportunity of stealing, his employer's cheques", it is not clear how far it is the duty of a banker to ensure, firstly, that his opening inquiries disclose the nature of the employment and, secondly, that he is at all times *au fait* with information of the kind. Again, how far should a banker go in verification of the information given? LORD WRIGHT turns these points aside rather lightly. With regard to the possibility of the banker's being given false information, he says that this is not likely ; on the chance of the customer's changing his employment : "It is useless to consider what might be the position if something had happened which did not happen". He rightly points out that a precaution does not cease to be proper for purposes of s. 82 merely because, though generally effective, it may in special circumstances be ineffectual. Is this *dictum* to

(t) 2 Halsbury's Statutes 46 ; see *ante*, p. 297.

(u) 2 Halsbury's Statutes 76.

be taken to mean that it is sufficient if the banker makes the inquiry without satisfying himself that the answer given is correct and without troubling to verify the position in the future?

Dealing generally with 'negligence', LORD WRIGHT said :

"The most obvious circumstances which should put the banker on his guard (apart from manifest irregularities in the endorsement and such like), are where a cheque is presented for collection which bears on its face a warning that the customer may have misappropriated it, as for instance where a customer known to be a servant or agent pays in for collection a cheque drawn by third parties in favour of his employer or principal. Such a case carries even a clearer warning if the cheque is endorsed 'per pro.' the employer or principal by the servant or agent."

He went on, as quoted above :

"... at least where the new customer is employed in some position which involves his handling, and having the opportunity of stealing, his employers' cheques, the bankers fail in taking adequate precautions if they do not ask the name of his employers, and fail even in carrying out the rule which I have just quoted, because they fail to ascertain a most relevant fact as to the intending customer's circumstances."

This statement is somewhat confusing, because, unless the inquiry is made, bankers cannot ordinarily know the position of prospective customers. But his Lordship must be understood to have meant that a banker should make inquiry in order to discover if his customer's circumstances are such that he should be on his guard. As LORD BUCKMASTER said :

"... it is obvious that the rules of the bank, dictated by common prudence in the conduct of their business, can be entirely avoided if such knowledge is not obtained."

On the contention of the bank that similar conditions might exist in regard to a daughter or a housekeeper as in the case of a husband, his Lordship said that the position "must depend on all the circumstances associated with their opening an account".

LORD WARRINGTON thought that

"The standard by which the absence or otherwise of negligence is to be determined must, in my opinion, be ascertained by reference to the practice of reasonable men in carrying on the business of bankers and endeavouring to do so in such a manner as may be calculated to protect themselves and others against fraud."

He seemed to think that the opening of one of the accounts (Perkins') in the case did not fulfil this requirement :

"I cannot think that in accepting such an introduction without making the inquiry in question or in fact any other inquiry the manager was either complying with rule 29 or taking any reasonable precaution to avoid in Perkins' case an infringement of the 'unwritten rule'."

LORD BLANESBURGH, on the other hand, in a dissenting

judgment, gave the practice of bankers in making inquiries on opening an account a different significance. He thought that

"... inquiry as to the name of a customer's employer ... had no reference at all to the possible perpetration of frauds within the reach of a clerk as such. It was neither designed nor in its imperfect range was it calculated to be a check upon these ... its only purpose, I am satisfied, was to test the proposing customer's respectability by reference to the status and position of the employer who had so far trusted him as to receive him into his service—information whose value for that purpose was in no way lessened by a mere change in that employment subsequently effected—information, therefore, which called for no later inquiries on the subject—its end, when it was given, being fully attained."

He went on :

"In these days of emancipation when female clerks, married as well as single, abound, a decision to the contrary is in danger of being invoked as authority for the proposition that when a man known to be married applies to a bank to open an account, the bank is negligent if it refrains from making similar inquiry with reference to his wife—a proposition which still strikes me as extravagant."

LORD RUSSELL OF KILLOWEN also dissented. In the course of his judgment he said :

"It seems, however, a very long step to take to say that because if banks know that a customer is employed by a firm whose cheque in favour of a third party he is paying in to his own credit, they should make inquiries before receiving payment of it, therefore banks are bound at the outset to ascertain the names of their customer's employers and are guilty of negligence if they do not."

And again,

"I know of no case, and none was cited to us, in which it has been held that a bank which did not in fact know was liable upon the footing of negligence in not making the initial inquiry."

This enlargement of the care which a banker has to exercise on opening an account may give rise to difficulty in practice. Certainly some prospective customers would resent the inquiries and might go elsewhere ; but it is not to be supposed that as a result of this decision bankers will make inquiry in all cases. They know pretty well when a legal risk is worth running, as in this connection it would be in the case of the majority of the new customers who are properly introduced. Bankers will serve themselves badly if they carry this decision any further than it actually goes and thus provide grounds for a further expansion of their duty to a true owner not to be negligent.

It is sometimes wrongly thought that the branch credit system was responsible for this decision. While it cannot be argued that a system is justifiable which permitted such a want of liaison between branches of the same bank as to make impossible the scrutiny which a collecting banker should make, LORD WRIGHT held the point to be immaterial to the case. The dissenting judgments agreed that the case had to be decided apart from the working of the system, which has now been amended

so as to avoid the division of information which previously it made possible.

There might be a possible question with regard to cheques payable to bearer. It does not strike one as a likely method for a company to adopt that they should pay an official by a cheque payable to themselves or bearer, but it was treated in *Morison's Case* as not calculated to arouse suspicion. In the Court of Appeal in the *Gordon Case* (w), COLLINS, M.R., suggested that there was evidence of negligence on the part of the bank, though the jury had negatived the existence of negligence. Presumably he refers to the taking of a cheque payable to a firm for the private account of a man known to be an employee of that firm, and there were bearer cheques in that case, classes 2 and 7. The servant of a company stands on the same footing as the servant of a firm. On the other hand, a distinction was drawn between order and bearer cheques of this nature in *Souchette, Ltd. v. London County, Westminster, and Parr's Bank, Ltd.* (y). So long as the matter is in any way doubtful, bankers will be well advised to be very cautious before taking even a bearer cheque from a known official which was more likely to be meant for his principals than for him.

Partnership cheque for private account

On the same principle, it is negligence to take a cheque made payable to a partnership for the private account of one of the partners (z). *Backhouse v. Charlton* (a), which might be cited as an authority to the contrary, was not strictly a case of collecting; it was a transfer from partnership to private account by cheque drawn by one of the partners, which cheque the banker was under obligation to honour.

Cheques to officials

It would be obvious negligence to collect for a man's private account cheques made payable to him in his official capacity, such as 'Collector of Rates', 'Collector of Inland Revenue', or the like, unless the banker is satisfied that the customer has the authority of his superiors to pay such cheques into private account, as where (in the memory of the author) a cheque payable to an Irish collector of excise, *eo nomine*, was paid into his private account. It was suggested that it might have been paid him in discharge of a legacy. And the same is the case where on the face of the thing it is obvious that the payee held the cheque in an official capacity and the cheque, although indorsed by him, is paid into a private account (b). In that

(w) [1902] 1 K.B., at p. 261. (y) (1920), 36 T.L.R. 195; Digest Supp.

(z) Cf. *Re Riches and Marshall's Trust Deed, Ex parte Darlington District Joint Stock Banking Co.* (1865), 4 De G. J. & Sm. 581; 3 Digest 260, 780; *Bevan v. National Bank, Ltd.* (1906), 23 T.L.R. 65; 3 Digest 240, 678.

(a) (1878), 8 Ch. Digest 444; 3 Digest 187, 376.

(b) *Ross v. London County, Westminster, and Parr's Bank, Ltd.*, [1919] 1 K.B. 678; Digest Supp.

case the cheques were payable to an official in that capacity, indorsed by him, stolen by an employee and paid by the latter into his private account with the defendant bank. There was conflicting evidence by bank managers as to how they regarded a payment in of this class. The case was decided against the bank.

The mere fact that the customer is a stockbroker or fills some other position which involves his having other people's money in his hands for investment or other business purpose does not, of course, affect the banker with notice or put him on inquiry, and he is perfectly entitled to treat all cheques paid in as absolutely the customer's own (c).

Absence of fiduciary relationship

In 1926, MACKINNON, J., refused, in *London and Montrose Shipbuilding and Repairing Co., Ltd. v. Barclays Bank, Ltd.* (d), to accept the suggestion that wherever the named payee on a cheque was a limited company and the cheque had been indorsed to an indorsee by that company, the bank collecting on behalf of the indorsee was put on inquiry. He was unable to draw such a conclusion from the *Underwood Case*. He doubted whether that case was authority for the proposition that where a cheque payable to a company purported to be indorsed over to one of its officers who paid it into his own account; there was a case for inquiry. This is a view to which bankers should unhesitatingly have subscribed, but they have contributed to their own discomfiture in this connection by forbidding their staffs to accept for the credit of private accounts cheques drawn in favour of limited companies, where there was no connection between the payees and the persons for whom they were asked to collect. The opinion of Mr. RAYNER GODDARD, K.C. (now LORD JUSTICE GODDARD), in support of this attitude, in the "Journal of the Institute of Bankers" (1932), vol. liii, p. 76, is interesting in view of a decision of his on his translation to the Bench. He recommended that :

"As the cases stand at present the only prudent course is for bankers to refuse to accept, without enquiry or special instructions, cheques made payable to companies for accounts other than those of the payee"; and again, "Presumably, also, if the cheque is paid into the account of another company the bank is put on enquiry, at least if the endorsement be general, as there would seem to be no good reason for insisting on enquiry where the credit is for an individual, and dispensing with it in the case of a company."

The judgment in question is that in *Motor Traders Guarantee Corporation, Ltd. v. Midland Bank, Ltd.* (e), GODDARD, J., held that the bank had been negligent in collecting for a motor trader a cheque payable to a firm of motor dealers, to which

(c) Cf. *Thomson v. Clydesdale Bank, Ltd.*, [1893] A.C. 282; 3 Digest 188, 380.

(d) (1926), 31 Com. Cas. 67; affirmed, 31 Com. Cas. 182; Digest Supp.

(e) [1937] 4 All E.R. 90; Digest Supp.

cheque the former had no title. The decision was based on the fact that the trader's account with the defendant bank had been unsatisfactorily conducted, several cheques having been dishonoured, principally for lack of funds, and that one trader was "bringing in another trader's cheque". The learned Judge was of the view that this put the bank on inquiry and that the inquiry in fact made did not discharge the onus placed on the bank by s. 82. There was no fiduciary relationship between the trader and either the plaintiffs (the drawers of the cheque) or the payees. This decision has gone further than any other (with the possible exception of *Lloyds Bank, Ltd. v. Savory (E. B.) & Co.*) to detract from the value to collecting bankers of s. 82 (*f*). Such an inroad on the protection which the section was intended to offer should have been contested. The reason why the majority of people have their cheques dishonoured is that they have not, at the time of presentment, the wherewithal to meet them, not that they are dishonest. Bankers know this quite well and if they find that a customer is drawing cheques without having the funds in hand, in order to gain time, they very soon close his account. He is a nuisance, but no more until proved so to be.

Not only has the position become a difficult one in practice, but there is scarcely any protection left in the section save in the case of conversion arising from the collection for an individual of a cheque, to which he has no, or only a defective, title, payable to another individual. In this result there seems no advantage to anyone. The banker is required to exercise a degree of care which cannot reasonably be expected of him, in view of the conditions in which he transacts his business and the uncertainty, often, of the possible effect of any given line of action. In addition the cheque has been well-nigh divested of its attribute of negotiability—all this because of an interpretation of 'negligence' rigid beyond reason. For long bankers have been refused the pleas of exigencies of business and of contributory negligence.

The interpretation of 'negligence' to include collection for anyone standing in a fiduciary capacity to the drawer or payee of a cheque is one with which no banker nowadays would quarrel, but to extend the meaning of the term beyond this in the matter of the collection of a negotiable instrument is unfair and unpractical.

Banks have made the position perhaps more difficult for themselves by attempting in books of instructions to lay down a course of practice which should, in given circumstances, be followed. Both in *Lloyds Bank, Ltd. v. Savory (E. B.) & Co.* and in *Motor Traders Guarantee Corporation, Ltd. v. Midland Bank, Ltd. (g)*., it was suggested on behalf of the plaintiffs that failure to

(*f*) 2 Halsbury's Statutes 76.
(*g*) [1937] 4 All E. R. 90; Digest Supp.

comply with the regulations contained in the books of instruction was evidence of negligence. In the latter case, however, GODDARD, J., put the matter in its right perspective. He said, at p. 96 :

" I again say that I am far from saying that the plaintiffs, or any other person whose property has been converted, are entitled to rely upon a literal performance, or are entitled to require a literal performance, by the bank of these regulations. The bank does not owe a duty to them to carry out this rule, that rule, or the other rule. Indeed, I doubt whether they owe their own customers the duty of carrying out all the rules which they may lay down as counsels of perfection. The question in every case is not whether the bank require a particular standard of conduct, but whether the particular acts which are done are enough to discharge the onus which is upon the bank either in respect of their own customer or in respect of some other customer."

Condition of customer's account

The question has more than once been raised whether the existing condition of a customer's account ought to influence the banker's mind when that customer pays in a large cheque for collection. If a man with a habitually small account or one on which the credit balance has steadily dwindled, or which is slightly overdrawn, suddenly pays in for collection a cheque for a very large amount, is that a suspicious circumstance calculated to put the banker on inquiry ?

Little or no guidance can be derived from the cases which have dealt with the point, owing to the diversity of view of the judges. In *Crumplin v. London Joint Stock Bank, Ltd. (h)*, PICKFORD, J., attached some weight to it. In *Commissioners of Taxation v. English, Scottish and Australian Bank (i)*, an account was opened with £20, and the next day a cheque for £786 18s. 3d. payable to bearer was paid in. The Privy Council saw nothing in this to excite suspicion or possible inquiry.

In *Morison v. London County and Westminster Bank, Ltd. (j)*, LORD READING, L.C.J., set out with great minuteness the progressive increase of the cheques paid in for five years, and came to the conclusion that such yearly increase would not of itself arouse doubt or suspicion, and, looking at the figures he quoted, such conclusion seems quite reasonable, and consistent, as he said, with increased salary or emoluments ; a solution not so applicable to the Privy Council case above quoted.

The dominant opinion among bankers is against the significance of sudden fluctuations ; they contend that the customer may have been keeping his account low in anticipation of this very payment or may have drawn out all available funds to make some investment of which the payment in represents the realisation. This view acquires some sanction from *Thomson v.*

(h) (1913), 109 L.T. 856 ; 3 Digest 242, 689.

(i) [1920] A.C. 683 ; Digest Supp.

(j) [1914] 3 K.B. 356 ; 3 Digest 242, 690.

Clydesdale Bank, Ltd. (k). But the opening an account with a nominal sum, speedily followed by the payment in of a large one, is not so readily accounted for.

B. MAKING INQUIRIES AS TO CUSTOMER ON OPENING ACCOUNT

In *Turner v. London and Provincial Bank, Ltd. (l)*, evidence was admitted, as proof of negligence, that the customer had given a reference on opening the account and that this was not followed up.

In *Ladbroke & Co. v. Todd (m)*, BAILHACHE, J., held the bank negligent because they did not make inquiries about a proposing customer, describing this as an ordinary precaution other banks took, bankers or bank officials having in that case given evidence that they made inquiries in such cases. *Harding v. London Joint Stock Bank, Ltd. (n)*, was a similar case, except that the bank on making inquiry as to why the cheque with which the account was opened was not drawn in favour of the prospective customer, were satisfied with confirmation from the drawers, actually written by the fraudulent person himself.

As to the Privy Council *dictum* on this point in *Commissioners of Taxation v. English, Scottish and Australian Bank*, see *ante*, p. 294.

Inquiring fate

Banks have, somewhat surprisingly, sometimes put forward, as evidence that they exercised due caution about the collection of a cheque, the fact that, before crediting it, they inquired from the paying bank whether it would be paid on presentation. It is obvious that such a proceeding affords no safeguard to the true owner. The paying banker could have no means of knowing in whose hands the cheque might be; the inquiry, so far as he is concerned, only relates to the state of his customer's account, and the precaution, as pointed out in *Bissell & Co. v. Fox Brothers & Co. (o)* and *Ogden v. Benas (p)*, is one taken by the collecting banker exclusively in his own interest and for his own benefit.

C. SPECIAL COLLECTION

In *Turner v. London and Provincial Bank, Ltd.*, *ubi supra*, the fraudulent customer had asked for the cheques to be specially collected. Evidence was given that it is a common practice for

(k) [1893] A.C. 282; 3 Digest 188, 380.

(l) (1903), "Legal Decisions Affecting Bankers", vol. ii, p. 33; "Journal of Institute of Bankers", vol. xxiv, p. 220; 3 Digest 242, 688.

(m) [1914] W.N. 165; 111 L.T. 43; 30 T.L.R. 433; 3 Digest 239, 674.

(n) (1914), "Legal Decisions Affecting Bankers", vol. iii, p. 81.

(o) (1885), 53 L.T. 193, C.A.; 3 Digest 238, 666.

(p) (1874), L.R. 9 C.P. 513, at p. 516; 3 Digest 242, 692.

banks to make special collections of cheques for customers mainly a matter for the banker's discretion. Special collection may be desired for a perfectly legitimate purpose ; it may be desired in order to get the money before suspicion is aroused.

D. THE 'NOT NEGOTIABLE' CROSSING

In *Great Western Railway Co., Ltd. v. London and County Banking Co., Ltd.* (q), LORD BRAMPTON said :

"That the respondents in good faith received payment of the cheque is beyond question. I am not, however, quite so sure that it was altogether without negligence, for I must assume the manager at Wantage knew the meaning and legal effect of the crossing with the words 'not negotiable'. This point, however, does not appear to have been raised, and certainly there was no finding upon it at the trial. I will reject it therefore for present purposes."

The obvious suggestion is that a banker cannot accept for collection a cheque marked 'not negotiable', from anyone but the payee, without negligence ; or, at least, that the fact of the cheque being so marked is sufficient to put the banker on inquiry. It was confidently hoped that this idea had been rejected and abandoned. Unfortunately, it has been, though somewhat hesitatingly, resuscitated by LORD READING in *Morison v. London County and Westminster Bank, Ltd.* (r). At p. 373 he says :

"The addition of the words, 'not negotiable', and in some cases 'not negotiable, account payee', to some of the crossed cheques . . . has, in my opinion, no bearing upon the matters to be decided in this case. The protection of s. 82 (s) is afforded to crossed cheques marked 'not negotiable' as well as to cheques not so marked. It is certainly not conclusive evidence of negligence against a banker who collects crossed cheques so marked. Even if I assume that the taking of a crossed cheque bearing these words would be some evidence of negligence it could not affect my decision upon the later cheques, as the other considerations to which I have referred would outweigh any value I could attribute to such evidence."

While dealing with this side of the question, it may be noted that in *Turner v. London and Provincial Bank, Ltd.* (t), evidence was given to show that at some banks especial care is taken in dealing with cheques marked 'not negotiable'. That case was early in 1903 : such evidence would certainly not be available now.

In view of LORD READING's *dictum*, following on LORD BRAMPTON's somewhat cryptic utterance, it unfortunately seems advisable to reproduce the remarks on the subject embodied in earlier editions of this book, which would otherwise have been omitted.

(q) [1901] A.C. 414, at p. 422 ; 3 Digest 239, 673.

(r) [1914] 3 K.B. 356 ; 3 Digest 242, 690.

(s) 2 Halsbury's Statutes 76.

(t) (1903), "Journal of Institute of Bankers", vol. xxv, p. 220 ; 3 Digest 242, 688.

Result of the legislation

It is submitted that there is no foundation for any such suggestion. Everything in the Bills of Exchange Act points to the diametrically opposite conclusion.

The provisions of ss. 81 and 82 (u) were formerly combined in one section, s. 12 of the Crossed Cheques Act, 1876; the substance of that section being as s. 81, and the present s. 82 appearing as a proviso thereto. The whole controversy in *Matthiessen v. London and County Bank* (w), decided in 1879, was whether the proviso applied to cheques other than those crossed 'not negotiable'. The Court held that it did; the proviso, though in that form, operating as a substantive enactment, and not being in terms restricted to any particular form of crossing.

It would indeed be extraordinary if the Bills of Exchange Act, in emphasising this decision by reproducing the proviso as an independent section, had excluded from its operation the very class of crossing to which alone it had been contended it applied (y).

Next, the whole scheme of s. 76 (z) makes the words 'not negotiable', where they appear, part of the 'addition' which 'constitutes a crossing', the existence of which crossing renders the cheque a crossed cheque. The words are as much a part of the crossing, and as much an element of a cheque crossed generally or specially, as the two parallel transverse lines or the name of a banker. The words used in each case are "with or without the words 'not negotiable'". When, therefore, s. 82 uses the phrase 'without negligence' in reference to a crossed cheque, it must mean negligence independent of anything which simply goes to constitute a crossed cheque.

Again, s. 81 specifically limits the effect of the 'not negotiable' crossing to title gained or conferred by the person taking the cheque so crossed. The collecting banker neither acquires nor confers any title to a cheque coming to his hands for collection and being so dealt with.

Again, where there is prior absence or defect of title, the effect of the 'not negotiable' crossing is to render the customer's title null or defective, the precise contingency against which the banker is protected by s. 82. The 'not negotiable' crossing and the provisions of s. 81 are as independent of s. 82, as s. 25 (a) and s. 82 were held independent of one another in the *Morison Case*, and for the same reason.

Seeing that it is absolutely impossible for the collecting

(u) 2 Halsbury's Statutes 76.

(w) (1879), 5 C.P.D. 7; 3 Digest 240, 680.

(y) Cf. *per* PICKFORD, J., in *Crumplin v. London Joint Stock Bank, Ltd.* (1913), 109 L.T. 856; 3 Digest 242, 689.

(z) 2 Halsbury's Statutes 74.

(a) 2 Halsbury's Statutes 46.

banker to verify any indorsement other than that of his customer, the addition of 'not negotiable' to a crossing would, on the view here combated, mean either that a transferee, however good his title, could never get the cheque paid, or that the banker would have to collect it blindfold, at his own risk, a condition of things the legislature can hardly have contemplated.

Finally, the statutory authorisation of the 'not negotiable' crossing for the protection and benefit of the public, and the consequent obligation on bankers to collect such cheques for their customers as much as crossed cheques not bearing those words, render applicable the canon of construction which requires that the banker should receive equivalent safeguards; which he would not do if any distinction were made, as regards him, between the two classes of cheques.

LORD BRAMPTON'S *dictum* was referred to in the earlier stages of the *Gordon Case*, but received no sanction therein, and the point was never mentioned in the House of Lords.

It is submitted that the above reasons are sufficient to justify the contention that the 'not negotiable' crossing has nothing to do with the collecting banker or he with it.

E. ACCOUNT PAYEE

One usually conclusive evidence of negligence in the collecting banker is to take a cheque crossed with the words 'account payee', or 'account so and so', for an account other than that indicated. This has even been held to apply where the cheque was payable to a specified payee or bearer. The only exception hitherto recognised is where the customer was a foreign bank, and 'account payee' or even, as in that case, 'account payee only' referred to the foreign bank's customer, as to whom it was obviously impossible for the English bank to know or find out anything (b). It is difficult to write with reticence about this unauthorised addition to cheques. As shown before (c), these words have no effect in limiting the transferability or full negotiability of an order or bearer cheque. It has hardly even been suggested that they have. If put on by anyone except the drawer they cannot be treated as any part of his mandate, because there is no statutory enactment enabling the holder to exercise deputed power in this respect, as there is in the case of a regular crossing or the words 'not negotiable' added to one. Besides, the mandate, direct or imputed, is only efficacious as between the drawer and his own, that is, the paying banker. The effect accorded them as against the collecting banker cannot be ascribed to the non-contractual care for the true owner's interests, because

(b) *Importers Co. v. Westminster Bank, Ltd.*, [1927] 2 K.B. 297; Digest Supp.

(c) *Ante*, p. 154.

they have no statutory sanction and connote no commensurate protection. Were the matter one of first impression, it might well be argued that any banker, being confronted with an absolutely contradictory and ambiguous document, one which on the face of it purports to be payable to order or bearer and at the same time indicates that it and its proceeds are to be devoted to a specified individual, was entitled to regard it in its true legal aspect, namely, as a negotiable instrument, available in anyone's hands, on which the superadded words were purely nugatory; and that, acting on this legitimate construction, he could not be taxed with negligence. Reasonable as this view is, it cannot be accepted. The practice has been tolerated so long and recognised to such an extent both by judges and bankers, that it would be absolutely hopeless for any collecting banker to set up that these words conveyed no meaning to him or that he was justified in ignoring their existence on a crossed cheque. So long ago as 1852 the cheque in *Bellamy v. Marjoribanks* (d) had words of this nature upon it, and significance was attached to the fact; their addition has year by year become more common, and the present custom of, at any rate, the vast majority of bankers is not to take in a cheque so marked for any account other than that indicated, save in such obviously exceptional cases as that of the *Importers Co. v. Westminster Bank, Ltd.*, above mentioned. In very many applications for payment, it is now specified that cheques sent are to be crossed 'account payee' or 'account so and so'. If the debtor wishes to make the Post Office the agent of the creditor, and not his own, and so shift the risk of theft or loss in the post, he must send a cheque strictly in accordance with the request, and so is bound to mark it accordingly. In *Akrockerri (Atlantic) Mines, Ltd. v. Economic Bank* (e), BIGHAM, J., regarded the addition as a mere direction to the receiving bank as to how the money was to be dealt with after receipt, which statement of the position was approved by ATKIN, L.J. (as he then was), in the *Importers Co. Case*. Inasmuch as the proceeds must, of necessity, be put to the account for which the cheque is received, this involves that the cheque can only be taken for the indicated account.

In *Bevan v. National Bank, Ltd.* (f), CHANNELL, J., distinctly held that it would be negligence to take a cheque marked 'account payee' for an account other than that of the payee.

In *Morison v. London County and Westminster Bank, Ltd.* (g), the point was not material, since the cheques so marked went into the designated account. LORD READING, L.C.J., says, at p. 374 :

(d) (1852), 7 Exch. 389; 3 Digest 240, 681.

(e) [1904] 2 K.B. 465; 3 Digest 240, 677.

(f) (1906), 23 T.L.R. 65; 3 Digest 240, 678.

(g) [1914] 3 K.B. 356; 3 Digest 242, 690.

"The words 'account payee' . . . are only to be found on the crossed cheques made payable to Abbott or order, or Abbott or bearer, defendants or bearer, and defendants or order. The words 'account payee' are a direction to the bankers collecting payment that the proceeds when collected are to be applied to the credit of the account of the payee designated on the face of the cheque."

It is not easy to see the object or effect of drawing a cheque payable to the collecting bank and marking it 'account payee'. A somewhat analogous practice, for which there is something to be said, is as follows. It is sometimes convenient to make a payment by post direct to a person's account at his bank, say, for a quarterly payment under covenant in a settlement. It enhances safety to draw the cheque payable to that bank or order, cross it either generally or specially to that bank, and mark it 'account so and so', its intended ultimate destination. The paying bank pay to a banker or the specified banker, and the collecting bank, although they are nominally payees, do in fact receive payment for a customer within s. 82 (h), as shown in *Morison's Case*, while at the same time it practically ensures that the proceeds go to the indicated account.

In *House Property Co. of London, Ltd. v. London County and Westminster Bank* (i), ROWLATT, J., treated it as negligence to collect a cheque payable to a named payee or *bearer* for an account other than that of the named payee, and, in the above quotation, LORD READING seems to contemplate the same effect of a similar cheque in other circumstances than those of the case before him.

This seems a further extension of the effect of this unauthorised addition, a more startling illustration of its indirect effect in limiting negotiability of what the Act makes negotiable. Still, if an order cheque can be so treated, there is no logical reason why a bearer cheque should not be, each being by nature equally negotiable, though by different means.

F. EXIGENCIES OF BUSINESS

In *Ross v. London County, Westminster, and Parr's Bank, Ltd.* (j), the controversy was revived as to the measure of knowledge and experience, the non-attainment or non-application of which is to be accounted negligence in a bank and so deprive it of the protection of s. 82. The question is a difficult one. From the point of view of the customer or the public, the contention would be that if the bank hold out a man as put there to do certain things, such as taking cheques for a customer's account, they impliedly represent him as competent for the post, and that it is their own fault if from want of experience he falls short of the requisite standard. On the side of the bank it would be

(h) 2 Halsbury's Statutes 76.

(i) (1915), 84 L.J.K.B. 1846; 3 Digest 241, 685.

(j) [1919] 1 K.B. 678; Digest Supp.

pointed out that it is not within the limits of possibility to have someone of the status of a bank manager to attend to every customer of the bank, that the 'without negligence' of s. 82 refers to negligence on the part of the 'banker' himself or the joint stock company which represents the old time banker, not of the individual subordinate or clerk; and that, if due care in selection, supervision, and allotment of work is exercised, negligence cannot be attributed to the principal for a personal slip or oversight on the part of such official. The rejoinder would be, 'The internal arrangements of your bank do not concern us; a corporation cannot be actually guilty of negligence; therefore the law holds it responsible for the negligence of each and every one of its servants; for example, in a railway or street accident'. Judicial expressions of opinion have varied on the point; in *Ross v. London County, Westminster, and Parr's Bank, Ltd.*, *ubi supra*, BAILHACHE, J., did recognise that the same standard of experience and care is not to be expected from a cashier as from a bank manager, thus approving, so far, the banker's point of view; but he went on to say, "I must, however, attribute to the cashiers and clerks of the defendants the degree of intelligence and knowledge ordinarily required of persons in their position to fit them for the discharge of their duties". And this was adopted by SANKEY, L.J., in another case (*k*). A similar discussion is as to exigencies and pressure of business.

One school, of which perhaps LORD BRAMWELL was the protagonist, refuses to give any countenance to this plea or make any allowance on this ground. In *Crumplin v. London Joint Stock Bank, Ltd.* (*l*), PICKFORD, J., said:

"It is no defence for a bank to say that they were so busy and had such a small staff that they could not make inquiries. If they could not make inquiries when necessary they must take the consequences."

The other party urges that the law exacts from no man the impossible; that as between customer and banker the implied contract is reciprocal, so that if the customer is only bound to do what is reasonable no greater burden can be laid on the banker; that, as regards the rest of the public, there is no duty, therefore no possibility of negligence, save perhaps the highly artificial one with respect to collecting or paying crossed cheques; and that a sudden rush of business is in the nature of *force majeure*, which a prudent man is not bound to anticipate or provide against.

In *Ross v. London County, Westminster, and Parr's Bank, Ltd.* (*m*), BAILHACHE, J., says:

"I am told that during the period in question the cashiers and clerks at the branches were being constantly changed, and that some of them could not have had very long experience of their work."

(*k*) See *ante*, p. 296.

(*l*) (1913), 109 L.T. 856; 3 Digest 242, 689.
(*m*) [1919] 1 K.B. 678.

He then uses the words above quoted, which do not suggest much concession to special circumstances, presumably due to the war.

G. CIRCUMSTANCES CONDONING NEGLIGENCE

To the case of *Morison v. London County and Westminster Bank, Ltd. (n)*, bankers were indebted for what seemed a valuable qualification or exception to the 'without negligence' of s. 82, though the case must be regarded as exceptional, in view of the facts. What might or would constitute negligence on the part of the collecting banker may lose that character if the acts or omissions adduced as evidence of negligence were induced or encouraged by the action or inaction of the true owner. The frauds in the *Morison Case* extended over a number of years; some of them, at least, were actually known to the true owner, others, the Court found, or assumed, came to the knowledge of accountants employed by him; some of the cheques which had been wrongfully dealt with, and with which it was sought to charge the defendant bank, had been the subject of subsequent arrangement between the fraudulent person and his employer, the plaintiff, and debited to the former in the books of the business. Not a word about this had been communicated to the defendant bank, the plaintiff's explanation being that he always believed that Abbott, the employee, was going to turn over a new leaf and be honest for the future.

In a state of affairs so flagrant, it is unthinkable that the bank should be liable, and the Court of Appeal evolved two effective lines of defence. They recognised that there was no direct contractual duty from the plaintiff to the defendants, no relation of banker and customer, the defendant bank not being the plaintiff's banker; no obligation, in the defendants' interest, on the plaintiff to examine his own pass book. Even if the plaintiff had banked with the defendants, the existence and effect of any such duties might have been doubtful; the *London Joint Stock Bank, Ltd. v. Macmillan and Arthur (m)* had not then rescued the mandant and mandatory question from its state of chaos, and the direct efficacy of the pass book as a check on the customer was, and still is, in English law, negligible.

There being no duty from plaintiff to defendants, there could be no negligence, which is a breach of duty; not even, strictly speaking, contributory negligence. The only recognisable duty in the whole business was the unilateral, statutory, one on the collecting banker not to be negligent.

The Court of Appeal happily surmounted the difficulty by applying and accepting the reasoning of an ordinary business man, in rebutting the *prima facie* view that the bank had been negligent in taking for the private account of a subordinate

(n) [1914] 3 K.B. 356; 3 Digest 242, 690.

(m) [1918] A.C. 777; 3 Digest 172, 293.

cheques signed 'per pro.' by him. And the ordinary business man would say to himself—'It is somewhat unusual that this man should be using cheques primarily intended for his employer for his own benefit. But the employer must be cognisant of it by this time. He keeps his own books, he has got his pass book, which would show him at once that these cheques never reached his account; he in any case presumably has his books audited; the man is still with him in a confidential position; the amount paid in in this way has increased year by year, which shows he is getting increased salary and so that he is satisfied with him; it must be all right. I shall go on as I have been doing.'

And he does so. What was reasonable deduction and consequent action in the individual is equally reasonable in the bank, therefore not negligence. On this view the Court decided for the bank, in respect of the later cheques. As to the earlier, they held that by his conduct and by withholding all information from the bank as to the employee's improper dealings with the cheques, the plaintiff must be held to have adopted those cheques. He had obviously done so in fact in the case of those which he charged against the man in his accounts with the business. And so they gave judgment for the bank on the whole claim.

This case was exceptional; some of the frauds were known to the plaintiff; the fraudulent employee had been re-employed by the plaintiff after his frauds were first discovered, and it was held that there was ratification of some of the transactions, this removing any cause for inquiry in regard to later ones. Such a combination of circumstances is not likely to occur often. The doctrine of reasonable interpretation of the attitude of the possible true owner as negating negligence is only applicable to protracted dealings. Still, it should be borne in mind that the decision, so far as it proceeded on the ground of reasonableness and so absence of negligence, was altogether independent of the exceptional features which were unknown to the bank; it took into account only those which were obvious or legitimate deductions; so that the case may still be a useful authority in less aggravated circumstances.

But the decision on the question of 'lulling to sleep' has since been definitely impugned. In *Lloyds Bank, Ltd. v. Chartered Bank of India, Australia and China* (o), SCRUTTON, L.J., said:

"I am not at all satisfied as to the grounds of such a decision [*Morison's*]. It does not seem consistent with the decisions in *Bank of Ireland (Governor & Co.) v. Evans' Charities Trustees* (p) and *Swan v. North British Australasian Co.* (q), that in order to act as an estoppel negligence must be the proximate cause of the loss. If my butler for a year has been selling my vintage wines cheap to a small wine-

(o) [1929] 1 K.B. 40; Digest Supp.

(p) (1855), 5 H.L. Cas. 389; 21 Digest 400, 1605.

(q) (1863), 2 H. & C. 175; 6 Digest 451, 2887.

merchant, I do not understand how my negligence in not periodically checking my wine book will be an answer to my action against the wine-merchant for conversion."

This example is hardly analogous, but in the same case, TOMLIN, J., said he thought that each repetition of his transaction was calculated to aggravate rather than to allay suspicion.

"There can be no presumption that every fraud must be discovered or that every discovery must be made within any given time, and, except upon the basis of some such presumption, I am unable to see why the Chartered Bank should have been entitled to assume that the absence of complaint in respect of any one transaction established the regularity of that or any subsequent transaction."

In *Lloyds Bank, Ltd. v. Savory (E. B.) & Co. (r)*, LORD WRIGHT found it "difficult to appreciate on what principle that case (*Morison's*) was decided in regard to this point; it can only be justified, if at all, on its special facts". If any further repudiation of the 'doctrine' be needed, it is to be found in the Court of Appeal judgment in *Carpenters' Co. v. British Mutual Banking Co., Ltd. (s)*.

As to the point of adoption of the earlier cheques. The application of the doctrine has hitherto been confined to controversies between the paying banker and the customer, so far as the editor knows. Its extension to the collecting banker seems amply justified.

In the *Morison Case* it was not a question of forgery. As before stated, the Court held that a cheque which was drawn within authority as regards the paying banker, which those cheques were, could not be a forgery with respect to the collecting banker. There used to be a theory that a forgery could not be adopted. It may be true that it cannot be ratified, but beyond question it may be and often has been adopted. This part of the case falls, therefore, within the consideration of forgeries, found under that head at p. 259.

CLAUSE 2.—'RECEIVES PAYMENT FOR A CUSTOMER'

Probably no five words in any other enactment have given rise to so much controversy and litigation as these. First, there is the question who is a customer. That has been already dealt with. Then what is receiving payment for a customer. As before stated, the *Gordon Case (t)* started the main trouble over this. There the House of Lords decided that a banker does not receive payment for his customer on a cheque, if he 'credits that cheque as cash', whatever that may mean, before the cheque is cleared and he, the banker, receives the

(r) [1933] A.C. 201; Digest Supp.

(s) [1938] 1 K.B. 511; [1937] 3 All E.R. 811; Digest Supp.

(t) [1903] A.C. 240; 3 Digest 240, 676.

proceeds ; the reason assigned being that in such case he does not receive payment for the customer, but for himself. Admitting that s. 82 (*u*) only contemplates the banker acting as agent, there is one exception, which may as well be dealt with here, so as to clear the ground.

Deputing functions

An agent cannot usually depute his authority or functions. A collecting banker may employ another bank as his agent for the collection of the cheque. The right is recognised by the power given by s. 77 (5) (*w*) to the banker to cross a cheque, crossed specially to himself, specially to another bank for collection, and the second banker is described as 'an agent for collection' in s. 79 (1) (*y*) ; the utilisation of a clearing, by a non-clearing, bank is a practical necessity, and was admitted by BIGHAM, J., in *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank* (*z*), to be an incident of the ordinary process of collection, and not to impair the protection under s. 82. In that case the question arose whether the transmitting bank violated the character of an agent by subjecting the cheques to a lien of the receiving bank, arising from the former being indebted to the latter. BIGHAM, J., held that there was no such lien. This is probably wrong, but it avoided decision of the point. The question is, however, finally decided—that such crossing is strictly consistent with agency—by the judgment of LORD BIRKENHEAD, L.C., in *Sutters v. Briggs* (*ā*), delivered on behalf of himself, LORDS BUCKMASTER and CARSON, LORD WRENbury concurring (*b*).

Must act only as agent

Subject to this, and reading the last words of s. 82 with the earlier ones (*c*), the banker must receive payment of the crossed cheque only for the customer.

LORD MACNAGHTEN says (*d*) :

"But the protection conferred by s. 82 is conferred only on a banker who receives payment for a customer, that is, who receives payment as a mere agent for collection. It follows, I think, that if bankers do more than act as such agents, they are not within the protection of the section."

And he subsequently describes the functions of a bank acting within the section as those of

"a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for their customer".

(*u*) 2 Halsbury's Statutes 76.

(*w*) 2 Halsbury's Statutes 74.

(*y*) 2 Halsbury's Statutes 75.

(*z*) [1904] 2 K.B. 465 ; 3 Digest 240, 677.

(*a*) [1922] 1 A.C. 1 ; 25 Digest 418, 213.

(*b*) See *ante*, p. 163.

(*c*) See the *Gordon Case*, [1903] A.C. 240, at p. 248, *per* LORD LINDLEY ; 3 Digest 240, 676.

(*d*) *Gordon Case*, [1903] A.C., at p. 245.

It cannot be denied that the section, dispassionately read, indicates agency pure and simple. The history of the legislation on the point is in favour of the same view (e). There is absolutely nothing in the whole of the legislation affecting crossed cheques which in the remotest degree necessitates the intervention of the collecting banker in any capacity other than that of an agent pure and simple. And the House applied here the canon of construction which they ignored in the case of the draft issued by a branch on the head office; namely, that the protection must be limited to the enhanced risks imposed by contemporary legislation. LORD MACNAGHTEN, at p. 246, quotes with approval the words of COLLINS, M.R., in the Court of Appeal:

“The protection afforded by s. 82 must be limited to that which is necessary for the performance of the duty which, by the legislation as to crossed cheques, was imposed on bankers.”

It must therefore be taken that the banker who desires the protection of s. 82 must confine his dealings with the cheque to such as are strictly compatible with the character of an agent and must receive the money in that capacity.

Amending Act of 1906

The Amending Act of 1906 (f) does not impugn this position; it merely provides that the protection of s. 82 shall not be lost by crediting as cash, treating such crediting as not inconsistent with agency. Whether, and if so how far, it affects the consequences of crediting as cash, apart from s. 82, will be dealt with hereafter. The *Gordon Case* turned on two points. First, that crediting as cash, whatever that meant, constituted the banker a holder for value. Second, that a man cannot hold a cheque and receive payment thereof only as an agent, if he be himself the holder for value of it. For the purpose of s. 82, so far at any rate as crediting as cash in the banker's own books is concerned, the Amending Act of 1906 has rendered the first point immaterial.

Holder for value

As to the second, LORD MACNAGHTEN said (g):

“It is impossible, I think, to say that a banker is merely receiving payment for a customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value.”

It may be noticed that the cheques in the *Gordon Case* to which LORD MACNAGHTEN refers bore only forged indorsements of the payee's name, as would frequently occur in other cases

(e) See *Matthiessen v. London and County Bank* (1879), 5 C.P.D. 7; 3 Digest 240, 680, and the judgment of COLLINS, M.R., in the *Gordon Case* in the Court of Appeal, [1902] 1 K.B. 242 expressly approved by LORD MACNAGHTEN in the House of Lords.

(f) 2 Halsbury's Statutes 81.

(g) [1903] A.C., at p. 245.

where the banker has to rely on s. 82. In such circumstances the banker could never be a holder at all within the definition of the Bills of Exchange Act. In the case of forged indorsement, the position of the banker which is inconsistent with agency must be regarded as that of a man who, but for the forged indorsement, would be a holder for value, a man who has taken the cheque as transferee and as his own. This attitude is equally outside the wording of the section. Believing he is entitled to the money, the banker receives it for himself, not only for the customer. The cheques in *Akrokkeri (Atlantic) Mines, Ltd. v. Economic Bank (h)* were in like condition, with forged indorsement. Yet BIGHAM, J., treated the collecting banker as holder.

Question of lien

In any case, LORD MACNAGHTEN's proposition, if accepted in its broadest signification, apparently raises a difficulty with regard to the banker's lien. Section 27, sub-s. 3 of the Bills of Exchange Act (j) reads as follows :

"Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien."

A banker has, by implication of law, a lien on all bills or cheques coming into his possession *qua* banker, to the extent of all moneys due from the customer (k).

Cheques for collection unquestionably come into the banker's possession in the course of his business as such.

If the customer is overdrawn at the time, the banker is, in the words of the sub-section, deemed to be a holder for value to the extent of such overdraft. But it is hardly to be supposed that LORD MACNAGHTEN contemplated this state of circumstances as excluding the banker from the protection of s. 82. If the position of a mere conduit pipe is insisted on, if the receipt must be only for the customer, and if the admixture of the smallest element of holder for value, even under this sub-section, is to destroy the protection, it would follow that the banker who took a thousand pound crossed cheque in the ordinary course for collection would be debarred from protection if the customer were temporarily overdrawn a few pounds. The conclusion appears impossible. *Clarke v. London and County Banking Co. (l)* has never been overruled, and the observations of ROMER, L.J., in *Great Western Railway Co. v. London and County Banking Co., Ltd. (m)*, on the subject of the lien, seem perfectly justified, if confined to a real case of lien.

(h) [1904] 2 K.B. 465 ; 3 Digest 240, 677.

(j) 2 Halsbury's Statutes 47.

(k) See *post*, 'Securities for Advances'.

(l) [1897] 1 Q.B. 552 ; 3 Digest 240, 675.

(m) [1900] 2 Q.B. 464, at p. 476 ; 3 Digest 239, 673.

Again, the banker is under a practical obligation to the customer to receive and present the crossed cheque, the relation of banker and customer enuring notwithstanding the overdraft ; and he is therefore in the position which warrants his claim to protection.

Interpretation of 'he is deemed'

One explanation may be derived from the words 'he is deemed' in s. 27 (3). As shown by *Hill v. East and West India Dock Co. (n)*, these words do not necessarily entail all the consequences which would ensue were the supposed state of facts actually existent ; they must be interpreted according to the object of the enactment. Subsection 3 of s. 27 is one of the group dealing with consideration ; its object is merely to establish the validity of an existing lien as consideration *pro tanto*. Its scope and purview relate only to cases where the party holding the bill is suing on it ; and the limited character of holder for value involved may fairly be regarded as existing only for the purposes for which it is conferred. Lien, being the right to hold another man's property until a debt is paid, is not only no indication of property, but is absolutely inconsistent therewith. The ordinary holder for value is the person in whom the absolute property of the bill is vested. The use of the word 'lien' in the sub-section points therefore to the artificial and restricted nature of the holdership for value therein referred to.

It may fairly be urged that it is optional with the banker whether he will claim or exercise his lien, that there is nothing to show, when he takes the cheque or receives the money, that the action is not solely on behalf of the customer ; the banker may be relying on setting off the debt against the money received for the customer, an equally efficacious remedy and one which presupposes the separate existence of the two amounts as debts. A far more definite and specific decision is necessary to overrule *Clarke v. London and County Banking Co.*, and to sanction the startling proposition that a banker taking a crossed cheque in the ordinary course for collection is debarred from protection by the mere fact of the customer chancing to be slightly overdrawn. This view is supported by a passage in the judgment of LORD BIRKENHEAD in *Sutters v. Briggs (o)*, delivered on behalf of himself and LORDS BUCKMASTER and CARSON, where he says :

" . . . if bankers are not holders of cheques for which they are agents for collection only, they derive no benefit from s. 27, sub-s. 3, as the sub-section does not apply, even where there is a lien, to a person who is not a holder."

And the decision was that such banker was a holder. This

(n) (1884), 9 App. Cas. 448 ; 42 Digest 638, 413.

(o) [1922] 1 A.C. 1, at p. 16 ; 25 Digest 418, 213.

implies that lien is not inconsistent with the position of agent for collection only.

Transferee and holder

What LORD MACNAGHTEN was probably referring to was the case of a real holder for value in the ordinary sense of the term ; that is to say, a transferee, who takes the entire property in the instrument. That character is really incompatible with agency ; and where a banker has become holder for value as a transferee, where the absolute property has vested in him, or would have done but for forged indorsement, it is certainly difficult to see how, in any sense, he can receive payment of the cheque only for the customer, or for anyone but himself.

The question, therefore, resolves itself into this : did the banker who claims protection under s. 82 take the cheque as transferee, or did he hold it for the customer, subject to his lien for the customer's indebtedness, if any, and if he chose to exercise that lien ?

Cases of transfer

If a banker gives cash for a cheque over the counter, he takes it as transferee (*p*). If it is paid in for the express purpose of reducing an ascertained overdraft, the banker takes it as transferee, the consideration being the pre-existing debt. If it is paid in on the express understanding that it may be drawn against at once, and is so drawn against, the banker takes it as transferee. So again, where, by course of business, an implied agreement is established to the effect that all cheques may be drawn against as soon as paid in, the banker presumably takes them as transferee, independent of their being actually drawn against. Such transactions really amount to the purchase of the cheque, analogous to the discounting a bill. As a financial operation it seems almost ridiculous to talk of purchasing or discounting a cheque, which is payable on demand and designed for speedy presentation, or to contemplate a bank gratuitously guaranteeing the payment thereof, to use the expression of the Privy Council in *Gaden v. Newfoundland Savings Bank* (*q*). At the same time a cheque is a bill, and if anyone gives a sum of money down for it or takes it on a promise, express or implied, to give some sum, either in one payment or several payments as drawn against, all conditions exist to constitute him a transferee, whether he be a banker or not. There may be reasons, such as the desire to oblige the customer or the convenience of transmitting money, which render such proceedings on the part of a banker reasonable, or even expedient.

(*p*) *Great Western Railway Co. v. London and County Banking Co., Ltd.*, [1901] A.C. 414 ; 3 Digest 239, 673.

(*q*) [1899] A.C. 281 ; 3 Digest 247, 718.

As to crediting in pass book

It would not be safe to assume that the amending Act of 1906 covers the case of cheques credited as cash in the customer's pass book before receipt of the money, and the pass book being delivered in that condition to the customer. The words of the Act, 'credits his customer's account', might well be confined to crediting in the bank's own books; in *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank (r)*, BIGHAM, J., adverted to the distinction between so crediting in the bank's own books, an uncommunicated entry, and crediting in the customer's pass book for his information; and it might well be argued that the latter constituted an authority or invitation to draw on the amount, equivalent to the special agreements above referred to. *Gaden v. Newfoundland Savings Bank*, a decision of the Judicial Committee (s) is, however, to the contrary effect.

An uncommunicated entry in the pass book would probably not affect the question (t).

Amendment Act of 1906

The Bills of Exchange (Crossed Cheques) Act, 1906 (u), renders unnecessary at present further reference to the *Gordon Case* in relation to s. 82.

COLLECTING BANKER OR HOLDER FOR VALUE

This is the real point in the *Gordon Case* which, as before stated, has ever since 1903 been and still is matter of acute controversy and some differing judicial opinion.

Does the *Gordon* judgment really mean that the mere crediting a cheque at its face value or as cash in the bank's own books constitutes the bank holder for value of that cheque?

If it does, then in cases where there is not forged indorsement and the cheque is not overdue and is not crossed and marked 'not negotiable', the banker who so credits it at once acquires, by so doing and whether the cheque be crossed or not, an absolutely independent title, just like any other transferee for value. Negligence does not affect that title; all he has to show is that he took the cheque in good faith and without notice of defective title in the customer.

If there is an equivalent amount to the customer's credit when his fraud is discovered, it might be reached by the process of following money of a wrongdoer, but that would not hurt the banker. If it has all been drawn out, nobody could touch the banker.

(r) [1904] 2 K.B. 465; 3 Digest 240, 677.

(s) [1899] A.C. 281; 3 Digest 247, 718.

(t) Cf. *Bevan v. Capital and Counties Bank, Ltd.* (1906), 23 T.L.R. 65; 3 Digest 247, 717.

(u) 2 Halsbury's Statutes 81.

The question did not arise for the first time in 1903. In *Re Palmer, Ex parte Richdale* (w) and *Royal Bank of Scotland v. Tottenham* (y) the Court of Appeal held that where a cheque is paid into a bank with the intention that it shall at once be placed to credit and it is so placed, the banker becomes holder for value. In the latter case, at any rate, the intention was deduced simply from the ordinary customer's letter forwarding the cheques, 'I shall be much obliged if you will place the two enclosed cheques for £250 and £50 to my credit', and they were entered at once as 'By cash £300'. KAY, L.J., cites LORD TOTTENHAM's judgment in *Foley v. Hill* (z): "money placed in the custody of a banker is to all intents and purposes the money of the banker", treating the payment in and acceptance of a cheque for credit as equivalent to the absolute payment in of coin. See also *National Bank v. Silke* (a), per BOWEN, L.J.

Coming to the *Gordon Case* itself (b), it may safely be asserted that there was no extraneous circumstance affecting the judgment. There was no evidence of any agreement or undertaking that the cheques might be drawn against before clearing: that result was attributed all through solely to the fact of their being paid in to credit and credited in the way they were.

The jury had found no negligence, so that the only reason why the bank lost protection as to the crossed cheques under s. 82 (c) was that they had not collected for the customer, but themselves, the apparently inevitable corollary being that, but for the forged indorsement, they would have been holders for value.

Again, why was the claim in respect of the bearer cheques in classes 2 and 7 abandoned, unless on the ground that the bank had become holders of them in due course?

And, read dispassionately, the language of the judgments does seem consistent only with this view. The leading judgments are those of LORDS MACNAGHTEN and LINDLEY.

LORD MACNAGHTEN says, at p. 245:

"It is well settled that if a banker before collection credits a customer with the face value of a cheque paid into his account, the banker becomes holder for value of the cheque. It is impossible, I think, to say that a banker is merely receiving payment for his customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value."

Again he says, at p. 246:

"It appears to me that the Master of the Rolls has accurately summed up the whole case: 'The protection afforded by s. 82 must,'

(w) (1882), 19 Ch. D. 409; 3 Digest 203, 472.

(y) [1894] 2 Q.B. 715; 3 Digest 204, 473.

(z) (1848), 2 H.L. Cas. 28; 3 Digest 168, 272.

(a) [1891] 1 Q.B. 435; 3 Digest 205, 479.

(b) [1903] A.C. 240; 3 Digest 240, 676.

(c) 2 Halsbury's Statutes 76.

he says, 'be limited to that which is necessary for the performance of the duty which, by the legislation as to crossed cheques, was imposed upon bankers. If bankers deal with crossed cheques in the ordinary way in which bankers dealt with crossed cheques before the legislation as to crossed cheques, and in which they deal with cheques other than crossed cheques at the present time, namely, by treating them as cash and upon receipt of them at once crediting the customer with the amount of them in the ordinary way, instead of making themselves a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for their customer, I think they are collecting not merely for their customer, but chiefly for themselves, and therefore are not protected by s. 82.'"

And the inference that crediting refers only to book entries is supported by a reference of LORD MACNAGHTEN's as to the two sets of books it might be necessary for a bank to keep if they want to retain that protection. But the approved quotation as to the 'ordinary way' and the need for differentiating between crossed and open cheques seems pretty significant of itself.

LORD LINDLEY said that it was plain that the bank did not wait until the cheques paid in by Jones had been passed through the clearing house before these amounts were placed to his credit. They were placed to his credit when he paid the cheques in, and he was allowed to draw upon his account increased by them as above stated.

There is no suggestion here of any previous undertaking or agreement that the customer should be at liberty to draw against the cheques at once; as will be seen, LORD LINDLEY treats this right as a natural consequence of the crediting.

Then LORD LINDLEY says, at p. 248:

"... for whom did the bank in fact receive such payment? The amount would not be again placed to Jones' credit, it was already there. ... As between the bank and Jones, the money paid belonged to the bank as soon as the bank received it."

Again:

"It must never be forgotten that the moment a bank places money to its customer's credit, the customer is entitled to draw upon it, unless something occurs to deprive him of that right."

Again:

"... so long as that section (s. 82) stands in its present form bankers who desire its protection will have to be more cautious and not place crossed cheques, paid in for collection, to the credit of their customers before such cheques are paid."

The decision was at the time regarded by bankers as relating to the ordinary existing custom of entering cheques as cash on payment in, irrespective of any other circumstances. A bill to restore the protection of s. 82 for crossed cheques so credited was put forward by a very representative body of bankers. That bill was in much the same terms as that finally passed by the government in 1906. The words 'credits his customer's account' were adopted from the *Gordon* judgment, and it

was never suggested that they meant or involved anything more or less than what they conveyed to persons versed in banking matters or, indeed, to the man in the street. The primary object was relief with regard to s. 82; the advantage in some cases from the alternative position of holder for value was not at that time contemplated, perhaps not appreciated.

Before the passing of the 1906 Act, Courts had sought to differentiate or modify the *Gordon* judgment. In *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank (d)*, and *Bevan v. National Bank, Ltd. (e)*, judges held that mere crediting did not make the bank holders for value, or deprive them of the protection of s. 82. Then came the 1906 Act and settled the whole matter, so far as s. 82 was concerned.

Since that date there has been a succession of cases where a fraudulent director or secretary, having full power to indorse on behalf of his company, has so indorsed cheques payable to the company, paid them into his private account, simply been credited, and has drawn out the money—cases like those before referred to under the head of 'Joint Stock Companies as Special Customers'. If the extreme views as to forgery suggested there attain general recognition, the question becomes of less importance, but that need not be anticipated. And there may be cheques with unquestionable indorsements but misapplied, or bearer cheques.

The point has been raised in some cases. In *Re Farrow's Bank, Ltd. (f)*, not a case of fraud, ASTBURY, J., said :

"It is no longer arguable, if it ever was, that the mere crediting . . . of a cheque paid into a customer's account, independently of any knowledge of the customer, or arrangement as between him and the bank, converts the bank into a holder for value as distinct from a recipient for the customer within the meaning of s. 82 of the Bills of Exchange Act, 1882. This is now laid down by the Bills of Exchange (Crossed Cheques) Act, 1906."

That case went to the Court of Appeal (g), but as there stated, there was no appeal on this point. The judge's statement is of course true so far as s. 82 is concerned, but it does not follow that the banker is not, in suitable conditions, entitled to set up the other capacity. The 1906 Act is an amending Act; it says 'within the meaning of s. 82', and, it is submitted, does not touch rights or liabilities referable to the particular circumstances specified by the Act, but outside the sphere of its operation. The 1906 Act refers only to crossed cheques; the holder for value contention, if accepted, applies to uncrossed cheques as well. Why should the banker be deprived of his right in the case of the latter by an illegitimate expansion of the Act of 1906?

(d) [1904] 2 K.B. 465; 3 Digest 240, 677.

(e) (1906), 23 T.L.R. 65; 3 Digest 240, 678.

(f) [1923] 1 Ch. 41, at p. 48.

(g) [1923] 1 Ch. 41; Digest Supp.

Underwood (A L.), Ltd. v. Barclays Bank (h) was a typical, straightforward case: a managing director of a one-man company, with full powers to indorse cheques payable to the company, did so indorse and paid them into his private account; the bank credited them at once and he drew on them, but not before they were cleared. SCRUTTON, L.J., refers to this, but only incidentally. He repeats that he can see no evidence of a binding agreement with the customer as to payments before clearing. The Court of Appeal decided against the bank. SCRUTTON, L.J., said, at p. 804:

"The cases where an agent for collection becomes a holder for value must turn on an express or implied agreement between bank and customer that the latter may draw against the cheques before they are cleared."

ATKIN, L.J., says, at p. 805:

"I think it sufficient to say that the mere fact that the bank in their books enter the value of the cheques on the credit side of the account on the day on which they receive the cheques for collection does not, without more, constitute the bank a holder for value. To constitute value there must be, in such a case, a contract between banker and customer . . . that the bank will, before receipt of the proceeds, honour cheques of the customer drawn against the cheques, . . . neither that decision (the *Gordon Case*) nor the statute (the 1906 Act) lay down the rule, judicial or statutory, that if a bank credits a cheque at once in its books, that fact, without more, makes the bank a holder for value."

Of course the 1906 Act does not lay down such rule; it was not within its province to do so, but on high authority it has been held to recognise it.

Jones & Co. v. Coventry (j) is in favour of the holder for value contention; it was there held that if the banker credited at once, he was bound to honour customer's cheques against amounts so credited, although the fact of crediting had not been communicated to the customer.

But the strongest support for the 'holder for value' contention comes from the judgment of the House of Lords in *Sutters v. Briggs (k)*. That case involved only one question, whether a banker who collected a crossed cheque marked 'not negotiable, account payee only' was (a) a holder, (b) a holder for value, coming within the wording of s. 2 of the Gaming Act, 1835, 'an assignee, indorsee or holder'.

The judgment was delivered by LORD BIRKENHEAD, L.C., but it was in fact the judgment of himself and LORDS BUCKMASTER and CARSON. At the end of his judgment LORD BIRKENHEAD said:

"I have only to add that my noble and learned friends LORD BUCKMASTER and LORD CARSON ask me to say that they have read

(h) [1924] 1 K.B. 775; Digest Supp.

(j) [1909] 2 K.B. 1029; 3 Digest 177, 320.

(k) [1922] 1 A.C. 1; 25 Digest 418, 213.

the judgment which I have just delivered and assent to its conclusions and to the reasoning upon which those conclusions are based."

LORD WRENBURY said he had considered LORD BIRKENHEAD's opinion and could not usefully add anything. It had been contended for the appellant that s. 82 showed that a collecting banker was an agent, not a holder. In his judgment, deciding that the banker was a holder, LORD BIRKENHEAD said as follows :

"Nor does s. 82 afford assistance to the appellant. . . . I cannot myself understand how any inference can be drawn from this section that a banker who receives payment as agent is not a 'holder'. On the contrary, the opposite inference is far more plausible, namely, that the protection became necessary because he is a holder and as such liable to an action for conversion. The appellant's attempt to draw such an inference is further shown to be baseless by the fact that the Bills of Exchange (Crossed Cheques) Act, 1906, confers the same protection on bankers who *by their action have made themselves* not only 'holders' but *holders in due course* (Gordon Case, and BOWEN, L.J., in *National Bank v. Silke*)." (h)

It has been sought to belittle this pronouncement as being a mere *obiter dictum* of LORD BIRKENHEAD. It is nothing of the sort. It is the considered opinion of the whole House, on a point vitally essential to the issue, part in fact of the *ratio decidendi*. To an unprejudiced mind the words 'by their action have made themselves' can only mean the independent, spontaneous action by the banker of crediting in his own books, apart from any arrangement or understanding with the customer; while the words 'holders in due course' not only include 'holder for value' but point distinctly to the person otherwise not needing the protection of s. 82, thus confirming the claim to double protection of persons in that position.

Two years later comes *Underwood (A. L.), Ltd. v. Barclays Bank*. In *Underwood (A. L.), Ltd. v. Bank of Liverpool*, tried just before, and reported with it, SCRUTTON, L.J., had held that the bank would have succeeded had they been holders for value. In *Underwood (A. L.), Ltd. v. Barclays Bank*, SUTTERS v. BRIGGS was totally disregarded, ATKIN, L.J., saying that neither the *Gordon Case* nor the 1906 Act afforded any support for the proposition for which, as above stated, the House of Lords in *Sutters v. Briggs* definitely cited them. After all, the House of Lords is paramount and superior to the Court of Appeal; if the interpretation above submitted of *Sutters v. Briggs* be accepted, *Underwood (A. L.), Ltd. v. Barclays Bank* cannot stand. The result is, of course, anomalous, almost ludicrous; the banker gets it both ways, agent for collection when that is his strong suit, holder in due course when he has been negligent or the cheque uncrossed. It is, nevertheless, difficult to follow LORD BIRKENHEAD (and the other members of the House) in his reference to the banker as holder in due course. It can

hardly have been the intention of the legislature to place bankers in this privileged position and it is not obvious from the wording of the Act that this privilege is conferred. The Act overrides the *Gordon* decision to the extent to which that decision was that a banker collected for himself if he credited as cash at once. But that merely excluded the banker's right to plead that he collected for a customer ; it did not necessarily make him a holder in due course. To argue that it did is unwarranted ; the Act makes no pretence of doing so. What has the Act to do with a holder in due course ? The latter has no need of such legislative assistance and the Act can only have been intended to replace a right which had been lost by a technical convenience. Certainly the Act applies to a holder in due course as it applies to a mere holder, but this means nothing, certainly not that the banker should as a result of it avoid a liability for which otherwise he would rightly be responsible. However, it is not the banker's doing. There was no artful design behind the bill the bankers promoted : the government took the bill up and had three years to consider it, and finally passed it in its present form, reproducing the language of the *Gordon Case*.

There, for the present, the matter stands. Some banks insert in their pass books or cheque books a notice to customers that cheques paid in cannot be drawn against until cleared. This would appear unnecessary so far as s. 82, as amended by the 1906 Act, is concerned, and inconsistent with the 'holder for value' attitude. It may, however, be useful as rebutting the right to draw against the cheques at once, deducible from the *Gordon Case*.

The right to debit the customer with a returned cheque, notwithstanding it has been credited as cash, is recognised by LORD LINDLEY when he says, at p. 248 :

"It is no doubt true that if the cheque had been dishonoured, Jones [the customer] would have become liable to reimburse the bank the amount advanced by it to him when it placed the amount to his credit. This he would have to do where any cheque, crossed or not, was placed to his credit, and was afterwards dishonoured."

Prior to the *Gordon Case*, namely in 1893, in *Re Mills, Bawtree & Co., Ex parte Stannard (m)*, VAUGHAN WILLIAMS, J., at p. 212, speaking of cheques paid in by Stannard, said as follows :

"The answer to this seems to me to be twofold. First, in all probability the cheques paid in were indorsed by Messrs. Stannard. This would give the bankers the right to debit their customer, even though they originally received the cheque as their property as a loan to them. Secondly, even if the cheque was not indorsed, the result in my opinion would be the same, because I think that, just as a cheque may operate as a conditional payment to be avoided if the cheque is

not honoured, so a cheque may operate as a conditional loan, creating a debt by the recipient of the cheque to be avoided if not honoured."

CLAUSE 3.—PAYMENT MUST BE RECEIVED FOR A CUSTOMER

Who is a customer ?

The next condition of protection under s. 82 and the amending Act is that payment of the crossed cheque be received for a person who is properly describable as a customer. Neither in s. 82 nor any other part of the Bills of Exchange Act nor in the amending Act is any definition of customer given.

There have been conflicting decisions on the question what constitutes a customer. They will be found, together with the author's views on the matter, under the heading 'The Customer', *ante*, chapter 2.

If a man is not otherwise a customer, such expedients as making him draw a counter cheque for the amount, or entering the transaction under some such head as 'Sundry Customers', will be of no avail (*n*).

CLAUSE 4.—' A CHEQUE '

What included in cheque

The next word calling for notice in s. 82 is 'cheque'.

The section would have no application to a document purporting to be a crossed cheque but to which drawer's signature was a forgery. It would not be 'drawn' on a banker.

Section 82 is in terms confined to cheques proper, but other Acts have brought certain kindred documents within its provisions.

Dividend warrant

Section 95 (*o*) extends the crossed cheques sections to 'warrants for payment of dividend'. This would not generally include a warrant for the payment of fixed interest, *e.g.*, on debenture stock (see *ante*, p. 137 for a discussion of this point, with special reference to *Slingsby v. Westminster Bank, Ltd.* (*oo*)). As to this and other instruments brought within s. 82 by s. 17 of the Revenue Act, 1883 (*p*), see *ante*, 'Cheques Generally'.

Post Office money orders

As to Post Office money orders and postal orders, and the

(*n*) Cf. *Mathews v. Brown & Co.* (1894), 63 L.J.Q.B. 494 ; 3 Digest 239, 671 ; *Great Western Railway Co. v. London and County Banking Co., Ltd.*, [1901] A.C. 414, at p. 425 ; 3 Digest 239, 673.

(*o*) 2 Halsbury's Statutes 80.

(*oo*) [1931] 1 K.B. 173 ; Digest Supp.

(*p*) 16 Halsbury's Statutes 547.

collecting banker's liability thereon, see under that heading, p. 144, *ante*.

Bills of Exchange (Crossed Cheques) Act, 1906, applies only to cheques proper

As above stated, s. 82 (*q*) refers in terms to cheques only. It has now to be considered whether by virtue either of the amending Act of 1906 (*r*), or the statutes bringing them within the crossed cheques sections, dividend warrants, orders for payment (sometimes wrongly described as conditional orders) and bankers' drafts, when crossed, can be safely credited as cash, the same as crossed cheques can be.

The amending Act of 1906 in terms applies only to cheques. It has now to be provided that it is to be read with the Bills of Exchange Act, but only that it may be cited with that Act as 'The Bills of Exchange Acts, 1882-1906', so that the two Acts are not incorporated and cannot be read as one. The Act of 1906 imports no new interpretation of the word 'cheque', and the reference to s. 82 involves that the interpretation must be the same as that in the principal Act, namely, a bill drawn on a banker payable on demand. The title of the Act, which is admissible for general explanatory purposes, states that it is an amending (not an interpreting) Act. It must, therefore, be regarded as introducing a new state of things; not merely as rectifying a judicial misconstruction of a previous existing section and so constituting a general interpretation of that section wherever incorporated or referred to. If then the effect of the Act of 1906 is to be extended to documents other than cheques, it must be by virtue of the particular enactments applying the crossed cheques sections to those documents. The possible documents are, first, dividend warrants; second, orders for payment.

Dividend warrants

As to dividend warrants, the enactment affecting them is s. 95 of the Bills of Exchange Act itself. It runs:

"The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend."

There is nothing here to make a dividend warrant a cheque, or invest it with any other character or incidents than those specifically included in the section. The section merely picks out certain defined provisions of the particular Act itself, and applies them to dividend warrants. It is not possible to read into the section words to make it run as follows: 'The provisions of this Act or any amending Act as to crossed cheques'; and the omission of such words, which are frequently inserted,

is significant. It would therefore appear that dividend warrants, if credited as cash, are outside the 1906 Act and s. 82.

Orders for payment

Orders for payment with receipt attached, or otherwise deviating from cheque form, are dependent for the benefit of the crossed cheques sections on s. 17 of the Revenue Act, 1883 (s). That section runs as follows :

" Sections 76 to 82 (i), both inclusive, of the Bills of Exchange Act, 1882, shall extend to any document issued by a customer of any banker and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque. Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument."

Here, again, the section selects particular sections of the Bills of Exchange Act, and extends those specific sections to the documents in question. There is no reference to any possible future amending Act. The words 'and shall so extend in like manner as if the said document were a cheque' might at first sight appear to carry the matter somewhat further. To a certain extent they assimilate the document to a cheque ; but it is only for the limited purpose of the enumerated sections ; they fall far short of altering its intrinsic character or attaching to it incidents arising out of subsequent legislation dealing professedly with cheques alone. Moreover, there is the proviso 'that nothing in this Act shall be deemed to render any such document a negotiable instrument'. If the Act constituted these documents cheques, they would of necessity be negotiable instruments. These documents, therefore, are outside the purview of the Act of 1906.

Bankers' drafts

The Bills of Exchange Act (1882) Amendment Act, 1932 (u) reads as follows :

" Sections 76 to 82 of the Bills of Exchange Act, 1882 (which relate to crossed cheques), as amended by the Bills of Exchange (Crossed Cheques) Act, 1906, shall apply to a banker's draft as if the draft were a cheque.

" For the purposes of this section, the expression ' banker's draft ' means a draft payable on demand drawn by or on behalf of a bank upon itself, whether payable at the head office or some other office of the bank."

Inasmuch as the amending Act specifically refers to the 1906 Act, bankers' drafts are clearly within the latter and the banker obtains the same protection, when crediting them as cash, as he has in respect of crossed cheques.

(s) 16 Halsbury's Statutes 547.

(i) 2 Halsbury's Statutes 74-76.

(u) 25 Halsbury's Statutes 63.

CLAUSE 5.—‘CROSSED GENERALLY OR
SPECIALLY TO HIMSELF’

The next condition which must be fulfilled in order to entitle the collecting banker to protection under s. 82 is that the cheque be “crossed generally or specially to himself”.

It must now be taken as finally settled that this clause is confined to cheques already crossed when coming to the banker's hands; and that a crossing by the banker himself of a previously uncrossed cheque, under s. 77, sub-s. 6, does not render it a crossed cheque for the purposes of this section (w).

As to the effect, with regard to s. 82, of one banker crossing to another for collection under s. 77, sub-ss. 5 and 6 (y), see *ante*, ‘Crossing by Collecting Banker’.

CLAUSE 6.—‘THE CUSTOMER HAS NO TITLE
OR A DEFECTIVE TITLE THERETO’

The case in which the banker is protected under s. 82 is therein defined as being where ‘the customer has no title or a defective title’ to the cheque. There are allusions or hints in the judgments of LORD HALSBURY and LORD BRAMPTON in *Great Western Railway Co. v. London and County Banking Co., Ltd.* (z), which might be taken to imply that the position of a *bona fide* holder for value of a cheque, or even of the banker who collected it for a customer, might be affected by the question whether the fraud by which the cheque was obtained amounted to larceny by a trick, which is a felony, or was merely an obtaining by false pretences, which is a misdemeanour. The suggestions are too vague to admit of detailed criticism, but there appears to be really no basis for any such proposition.

A man who has stolen a cheque can give a perfectly good title to another, who takes it as a holder in due course (a). The Larceny Act, 1916, s. 45 (b), exempts negotiable instruments in the hands of a *bona fide* holder for value from revesting in the original owner even after conviction of the offender, an exemption which has been judicially interpreted as affording complete protection to such holder (c). Cheques are not ‘goods’ within s. 62 of the Sale of Goods Act, 1893 (d), and

(w) *Bissell & Co. v. Fox Brothers & Co.* (1884), 51 L.T. 663; the *Gordon Case* in the Court of Appeal, [1902] 1 K.B. 242, and in the House of Lords, [1903] A.C. 240; 3 Digest 240, 676, where LORD LINDLEY says, at p. 249: “It appears to me that s. 82 would be deprived of all meaning if it were held to apply to cheques not crossed when they came to the hands of the bank seeking the protection of that section”.

(y) 2 Halsbury's Statutes 74, 75.

(z) [1901] A.C. 414; 3 Digest 239, 673.

(a) *Lloyd v. Howard* (1850), 15 Q.B. 995, at p. 997; 6 Digest 197, 1217.

(b) 4 Halsbury's Statutes 838.

(c) See *Chichester v. Hill & Son* (1882), 52 L.J.Q.B. 160; 6 Digest 425, 2765.

(d) 17 Halsbury's Statutes 642.

so are exempt from s. 24, sub-s. 1 of that Act (e). It would be strange if civil trials on a bill or cheque were liable to be complicated by incidental criminal proceedings to determine, in the absence of the alleged criminal, whether his conduct amounted to felony or misdemeanour. In *Chutton v. Attenborough & Son* (f), there was actual theft, coupled with fraud which might well have been classed as larceny by a trick; yet the House of Lords unhesitatingly decided in favour of the holder in due course.

If the cheque is crossed 'not negotiable', it can make no difference whether the infirmity of title arises through felony, misdemeanour, or some disabling circumstances not amounting to crime. In other cases, the only question which can be raised against the holder in due course is, Was the document knowingly issued as a negotiable instrument? (g).

The position is, if possible, stronger in the case of the collecting banker. The customer cannot have less than no title, even if he has obtained the cheque by larceny; and against the total absence of title s. 82 (h) affords protection.

CLAUSE 7.—'ANY LIABILITY'

The operative words of s. 82 are :

"the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

'Any liability' covers all forms of action which the true owner might otherwise have brought, conversion, money had and received, or anything else. The protection is not cut down by the words 'by reason only of having received such payment', but extends to "every step taken in the ordinary course of business and intended to lead up to that result" (j). See also *Morison v. London County and Westminster Bank, Ltd.* (k), and *ante*, p. 293. Indeed, the scope of the protection should be expressed by a still broader formula as 'extending to every act which would be in the ordinary course of business if everything was in order'. Where forged indorsement intervenes, nothing that is afterwards done with the cheque is 'in the ordinary course of business'. For instance, the conversion of a general crossing into a special one by the collecting banker can only be justified on the ground of his being a holder under s. 77 (3) (l), which, in case of forged indorsement, he is not; yet the pro-

(e) 17 Halsbury's Statutes 625.

(f) [1897] A.C. 90; 3 Digest 238, 667.

(g) *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K.B. 489; 35 Digest 12, 52.

(h) 2 Halsbury's Statutes 76.

(j) *Per* LORD MACNAGHTEN, *Gordon Case*, [1903] A.C., at p. 244; 3 Digest 239, 670.

(k) [1914] 3 K.B. 356; 3 Digest 242, 690.

(l) *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K.B. 465; 3 Digest 240, 677.

tection was accorded in that case in like circumstances, and it would be unreasonable to withhold it on any such ground. In the *Gordon Case* itself there were forged indorsements ; which goes to show that LORD MACNAGHTEN contemplated their intervention. See also *Sutters v. Briggs (m)*.

CLAUSE 8.—‘ TO THE TRUE OWNER ’

As to who is true owner, see *ante* pp. 213, 230. The true owner being the only person entitled to or interested in the cheque and its proceeds, protection against him secures complete immunity to the banker.

CLAUSE 9.—‘ BY REASON ONLY OF HAVING RECEIVED SUCH PAYMENT ’

As to the extension of the protection to all such steps as would have been in the ordinary course of business, leading up to the receipt of payment, had everything been in order, see above. By the combined or alternative effect of ss. 82, 80 and 60, a banker is protected who collects for one customer a crossed cheque drawn by another customer.

Protection apart from s. 82

Apart from s. 82, protection to the collecting banker is very limited in the case of cheques. He may escape liability in whole or in part if he can show that the proceeds or some of them have reached the true owner or been applied for his benefit (n), cf. *Underwood's Case*, where the proceeds of the cheques had been mixed with the customer's own money and an inquiry was ordered (o).

In *Souchette, Ltd. v. London County Westminster and Parr's Bank, Ltd. (p)*, a fraudulent employee obtained from his company cheques payable to creditors of the company for larger amounts than were due, forged the indorsements, and paid them into his private account, discharging the actual debts by his own cheque on the collecting bankers. The latter were only held liable for the difference.

As to cheques to which the customer has a revocable title, collected prior to repudiation, see *ante*, ‘ Void and Voidable Instruments ’.

(m) [1922] 1 A.C. 1 ; 25 Digest 418, 213.

(n) *Bevan v. National Bank, Ltd.* (1906), 23 T.L.R. 65 ; 3 Digest 240, 678 ; *Reid v. Rigby & Co.* [1894] 2 Q.B. 40 ; 1 Digest 318, 386 ; *Jacobs v. Morris*, [1902] 1 Ch. 816 ; 6 Digest 110, 751 ; *Reverston Fund and Insurance Co. v. Maison Cosway, Ltd.* [1913] 1 K.B. 364 ; 1 Digest 318, 388.

(o) See also *Corporation Agencies v. Home Bank of Canada*, [1927] A.C. 318 ; *Stewart (Alexander) & Son of Dundee, Ltd. v. Westminster Bank*, [1926] W.N. 271 ; *Liggitt (B.) (Liverpool), Ltd. v. Barclays Bank, Ltd.*, [1928] 1 K.B. 48 ; Digest Supp.

(p) (1920), 36 T.L.R. 195 ; Digest Supp.

A. COLLECTING BILLS

There is no statutory protection whatever for the banker with regard to the collection of bills proper. It has been suggested that a bill drawn by a customer on his banker payable at a future date might be crossed under s. 17 of the Revenue Act, 1883 (*q*), and that in such case the collecting banker would be protected. It is true that that section is not, in terms, confined to documents payable on demand, but it is obviously intended to deal with instruments of lower commercial standing than bills or cheques; and the restriction of payment to the specified payee, the negation of negotiability, and the absence of any relativity of obligation and risk render it quite inapplicable to bills after date, even if drawn by customer on banker.

As an agent, however, the banker collecting bills for a customer is entitled to all the rights of and consideration due to a mandatory against and from his mandant, as defined in *London Joint Stock Bank, Ltd. v. Macmillan and Arthur* (*r*) so far as that is relevant. Unless himself in fault, he can claim indemnity from his customer and can debit him with a dishonoured bill or with any amount for which he has been found liable to a true owner. He is not liable for acting reasonably, though mistakenly, on ambiguous instructions. The principal must save him harmless from any loss into which he has led him by word, deed, or silence.

B. HOW TO BE COLLECTED

The banker is bound to present the bills for acceptance and payment in accordance with the provisions of the Bills of Exchange Act, and must give notice of dishonour to the customer or the persons liable on the bill (*s*). If the banker employ a sub-agent for the purpose of collecting bills, he is responsible to the customer for negligence on the part of such sub-agent (*t*). The banker is further responsible to the customer for moneys received by such sub-agent, apart from any question of account between banker and sub-agent (*u*).

Agent for remitting banker

But the banker receiving bills for collection from another banker is not agent for that banker's customer, but for the remitting banker; and, unless he has distinct notice that the

(*q*) 16 Halsbury's Statutes 547.

(*r*) [1918] A.C. 777; 3 Digest 233, 644.

(*s*) Bills of Exchange Act, 1882, s. 49 (13); 2 Halsbury's Statutes 60; *Bank of Van Diemen's Land v. Bank of Victoria* (1871), L.R. 3 P.C. 526; 3 Digest 206, 483; *Bank of Scotland v. Dominion Bank (Toronto)*, [1891] A.C. 592; 3 Digest 207, 488.

(*t*) *Mackersy v. Ramsays, Bonars & Co.* (1843), 9 Cl. & Fin. 818; 3 Digest 207, 485; *Prince v. Oriental Bank Corporation* (1878), 3 App. Cas. 325; 3 Digest 173, 301.

(*u*) *Mackersy v. Ramsays, Bonars & Co.*, *ubi supra*.

bills are the property of the customer and are in the remitting banker's hands purely for collection, may treat them as that banker's property (w). On this basis they would be liable to the lien of the sub-agent for any balance due to him from the remitting banker (y). In *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank* (z), BIGHAM, J., with respect to cheques, uses expressions implying that, in his opinion, collection was a special purpose inconsistent with lien, but this is clearly not the case (a).

Lien against customer

The collecting banker equally has a lien, on bills handed him for collection, for any amount due from the customer at the time of receiving the bills or during their currency (b). If the customer has indorsed the bill, the banker has a remedy against him to the extent of such indebtedness (c). Mere indorsement for collection, without indebtedness on the part of the customer, of course gives no remedy on the bill against the customer in case of dishonour, there being no consideration (d). The banker's course is to debit the customer with the returned bill. If the account will not stand this, the amount should be treated as an overdraft or as money which the customer is bound to repay to the banker as his agent.

Collection or transfer

In the absence of any protection analogous to that of s. 82 (e), the question whether a banker has taken a bill for collection, subject to his lien, or as transferee for value, has never had the same importance as in the case of cheques. It would seem to depend on the nature of the dealing between the banker and customer.

Mere indorsement by the payee of an order bill or by an indorsee of one specially indorsed is, of course, no test, as that is necessary for collection. Even an unnecessary indorsement by the customer may be only for extra security in case the lien has to be exercised (f).

(w) *Johnson v. Roberts* (1875), 10 Ch. App. 505; 3 Digest 248, 724; *Re Dilyworth, Ex parte Armistead* (1828), 2 Gl. & J. 371; 3 Digest 212, 524.

(y) *Re Parker, Ex parte Froggatt* (1843), 3 Mont. D. & De G. 322; 3 Digest 210, 505; *Prince v. Oriental Bank Corporation* (1878), 3 App. Cas., at p. 335; 3 Digest 173, 301; *Re Burrough, Ex parte Sargeant* (1810), 1 Rose, 153; 3 Digest 211, 514.

(z) [1904] 2 K.B. 465; 3 Digest 240, 677.

(a) Cf. *Misa v. Currie* (1876), 1 App. Cas. 554, at pp. 565, 569, 573; 6 Digest 115, 772; *Thompson v. Giles* (1824), 2 B. & C. 422; 3 Digest 210, 508.

(b) *Giles v. Perkins* (1807), 9 East, 12; 3 Digest 210, 507; *Re Firth, Ex parte Schofield* (1879), 12 Ch. D. 337; 6 Digest 135, 893; *Dawson v. Isle*, [1906] 1 Ch. 633; 3 Digest 258, 771.

(c) *Giles v. Perkins, ubi supra*, at p. 14.

(d) *Re Firth, Ex parte Schofield, ubi supra*, at p. 343.

(e) 2 Halsbury's Statutes 76.

(f) *Re Firth, Ex parte Schofield, ubi supra*; *Re Harrison, Ex parte Barkworth* (1858), 2 De G. & J. 194; 3 Digest 211, 513.

Entering as cash

Entering as cash before receipt of payment has been held evidence of the banker's having taken the bill in his own right (*g*), and as constituting an undertaking by the banker to honour cheques to the amount of the bills (*h*). In the latter case, VAUGHAN WILLIAMS, J., recognised the authority of *Thompson v. Giles*, but said it had never been applied to an instrument payable on demand. Subject to the question as to its real meaning, much of the judgments in the *Gordon Case* appears equally applicable to bills payable after date. If crediting as cash operates as a transfer of a current bill, the Bills of Exchange (Crossed Cheques) Act, 1906, has, of course, no bearing on the matter.

C. COLLECTION OF CHEQUES**Presentation of cheques**

Cheques paid in for collection must be presented with diligence. When the cheque is drawn on a bank in the same place, the banker should present it the day after he receives it (*j*). When the cheque is on a bank in another place, it is sufficient if the banker either present it or forward it on the day following receipt (*k*).

Such forwarding may be to another branch or to an agent of the bank, who has the same time for presentation after receipt (*l*). A non-clearing bank can thus use a clearing bank.

Employment of banker

Some expressions of Sir Mackenzie Chalmers (*m*) seem to suggest a doubt whether the customer is entitled to the extension of time involved by collection through his banker, except where such collection is obviously necessary, as in the case of crossed cheques. It is true that in *Alexander v. Burchfield* (*n*), the Court held that the recipient of a cheque was bound to present the day after receipt, either by himself or his banker. But that case was decided in 1842, on common law principles only. Under existing legislation the only limitation in the case

(*g*) *Giles v. Perkins* (1807), 9 East, 12; 3 Digest 210, 507; *Thompson v. Giles* (1824), 2 B. & C. 422; 3 Digest 210, 508; *Re Harrison, Ex parte Barkworth, ubi supra*; cf. *Dawson v. Isle*, [1906] 1 Ch. 633; 3 Digest 258, 771.

(*h*) *Thompson v. Giles, ubi supra*, at pp. 429, 431; cf. *Re Mills, Bawtree & Co., Ex parte Stannard* (1893), 10 Moir. 193; 3 Digest 218, 556.

(*j*) *Rickford v. Ridge* (1810), 2 Camp. 537; 3 Digest 201, 457; *Alexander v. Burchfield* (1842), 7 Man. & G. 1061; 3 Digest 203, 469; *Forman v. Bank of England* (1902), 18 T.L.R. 339; 3 Digest 219, 559.

(*k*) *Hare v. Henty* (1861), 10 C.B.N.S. 65; 3 Digest 201, 460; *Prideaux v. Criddle* (1869), L.R. 4 Q.B. 455; 3 Digest 202, 461; *Heywood v. Pickering* (1874), L.R. 9 Q.B. 428; 3 Digest 202, 463.

(*l*) *Prideaux v. Criddle, ubi supra*.

(*m*) *Bills of Exchange*, 10th ed., p. 295.

(*n*) (1842), 7 Man. & G. 1061; 3 Digest 203, 469.

of a bill payable on demand is that it shall be presented for payment within a reasonable time after issue in order to charge the drawer, or within a reasonable time after indorsement to charge the indorser. Cheques differ from other bills on demand with regard to the liability of the drawer ; but in any event the only requisite is that the cheque shall be presented within reasonable time.

Sections 45 and 74 of the Bills of Exchange Act (o) import the custom of trade and the custom of bankers as elements in the calculation of what is reasonable time for the presentation of a cheque.

Section 49, sub-s. 13 (p), as to bills in the hands of an agent when dishonoured, is applicable to cheques, and seems to recognise the intervention of a banker. Of course, as to crossed cheques, the thing is beyond dispute. And it would be impossible to contend nowadays that presentation through a banker, even of an uncrossed cheque on a banker in the same town, was not a reasonable method of presentation, or that the delay thereby occasioned precluded the presentation from being within reasonable time, as reckoned by the custom of trade and bankers. The idea of business firms or even individuals collecting their own cheques is, under modern conditions, absolutely inconceivable.

Anyway the question does not immediately concern the banker, who has only to present within the limits above specified in order to discharge his duty to his customer.

Default of sub-agent

Where a banker employs another agent, he is responsible to the customer for default on the part of that agent (q).

Presentment through a recognised clearing house is equivalent to presentment to the drawee bank (r).

D. PRESENTMENT BY POST

Presentment by one bank to another by post is sufficient (s). In such case it would seem that the paying bank receives the cheque as agent for presentation to itself (t), and so can hold it till the day after receipt (u). If not paid, it must be returned the day after receipt ; the drawee bank cannot claim two days, one for presentment to itself, the other as an agent holding a dishonoured bill.

(o) 2 Halsbury's Statutes 55, 73.

(p) 2 Halsbury's Statutes 60

(q) *Mackersy v. Ramsays, Banars & Co.* (1843), 9 Cl. & Fin. 818 ; 3 Digest 207, 485. See also *Calico Printers' Association, Ltd. v. Barclays Bank* (1931), 145 L.T. 51 ; Digest Supp.

(r) *Reynolds v. Chettle* (1811), 2 Camp. 596 ; 3 Digest 226, 596.

(s) *Prideaux v. Criddle* (1869), L.R. 4 Q.B., at p. 461 ; 3 Digest 202, 461.

(t) *Bailey v. Bodenham* (1864), 16 C.B.N.S. 288, at p. 296 ; 3 Digest 203, 467.

(u) See opinion of Mr Arthur Cohen, Q.C., and Sir Mackenzie Chalmers, *Questions on Banking Practice*, 8th ed., Question 388.

As between two customers

When a cheque drawn by one customer of a bank is received from another customer, it is a question of fact whether it is presented for payment or paid in for collection. If the latter, the bank has the usual time of an agent for returning it and giving notice of dishonour (*w*). If accepted for collection, the bank must pay such cheque in preference to a debt due to itself from the drawing customer (*y*). If, for instance, the drawer's account was overdrawn when the cheque was paid in, but, before it was returned, the drawer paid in sufficient funds to cover it, not appropriated to other payments, the bank would have to pay the cheque, irrespective of its lien for the overdraft.

By stranger

A cheque sent by post by a private individual to the drawee bank with request for a remittance by post would in practice be returned at once unpaid. The bank is obviously not bound to undertake the office of collecting agent; while, as paying bank, presentment by post is only sufficient where authorised by agreement or usage (*z*), and the usage of bankers does not authorise presentment by post except by a bank.

Return of cheque unpaid

In any case the duty of a bank receiving by post a cheque drawn on it for payment only is, if it is not going to pay the cheque, to post it back the same day. Where the rules of the country clearing apply, that is, where a cheque is presented to a country bank through the London Clearing House, the time allowed is very limited. The cheque must be returned by the first post after receipt, and direct to the country or branch bank, whose name and address are across it. The rule is as follows:

“Any country bank not intending to pay a cheque sent to it for collection, to return it direct to the country or branch bank, if any, whose name and address is across it.”

The words ‘for collection’ as used here, though justified by banking phraseology, are somewhat misleading, especially as they occur elsewhere in the rules in the ordinary sense. In this particular case they are equivalent to ‘for payment’, the cheque necessarily reaching the country bank through its own London agent. If the drawee country bank does not return the cheque direct by the first post after receipt, it is held liable to pay the amount (*a*) if the presenting bank has acted on the presumption that it would be paid.

(*w*) *Boyd v. Emmerson* (1834), 2 Ad. & El. 184; 3 Digest 204, 475.

(*y*) *Kilsby v. Williams* (1822), 5 B. & Ald. 815; 3 Digest 204, 474.

(*z*) Bills of Exchange Act, s. 45, sub-s. 8; 2 Halsbury's Statutes 57.

(*a*) *Parr's Bank, Ltd. v. Ashby (Thomas) & Co.* (1898), 14 T.L.R. 563; 3 Digest 223, 583.

The rules of provincial clearing houses differ as to the time within which unpaid cheques must be returned.

Liability for delay

If the banker fails to present the cheque within the allotted time after it reaches him, he is liable to his customer for loss arising from the delay (*b*). The indorser may thus be discharged by the omission to present the cheque within a reasonable time after the indorsement. The drawer of a cheque is, however, in a different position in this respect from the drawer of an ordinary bill payable on demand. The provisions of s. 45 are, in the case of cheques, modified by s. 74 (*c*); and the drawer, except in the case, and to the extent, of damage sustained by failure of the drawee bank during delay in presentment, remains liable on the cheque unless and until released by the Limitation Act. This reduces the risk involved by delay, but it is the banker's duty not to subject his customer, and incidentally himself, to it. The banker is further liable to his customer for damage to credit if he dishonour a cheque which there would have been funds to meet if cheques paid in had been properly presented for payment (*d*).

Duty to give notice of dishonour

The collecting banker must give notice of dishonour with regard to any bills or cheques dishonoured on presentation by him.

On cheques

So far as cheques are concerned, the need for notice of dishonour to the drawer is, as previously stated, somewhat of an anomaly, the drawer being the principal debtor on the instrument, and having no right of recourse against any other party. Still he is drawer within s. 48 (*e*), and as such entitled to notice, though in the majority of cases omission to give it would be excused under either (4) or (5) of s. 50, sub-s. (2) (*c*) (*f*), the dishonour having arisen either from insufficient funds, in which case the banker is under no obligation to pay the cheque, or from countermand of payment by the drawer.

To whom to be given

Under s. 49, sub-s. 13 (*g*), where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. The latter would seem far the preferable course for

(*b*) *Lubbock v. Tribe* (1838), 3 M. & W. 607; 3 Digest 205, 476.

(*c*) 2 Halsbury's Statutes 73.

(*d*) *Forman v. Bank of England* (1902), 18 T.L.R. 339; 3 Digest 219, 559.

(*e*) 2 Halsbury's Statutes 58.

(*f*) 2 Halsbury's Statutes 61.

(*g*) 2 Halsbury's Statutes 60.

the collecting banker. It is somewhat improbable that he should be acquainted with the addresses of the parties to the bill or cheque other than his own customer ; there seems no reason why he should take upon himself the additional labour of notifying them of the dishonour ; and if he gives notice, say to the last indorser only, he runs the risk of that indorser not passing it on, and of the other parties being consequently discharged. In such case he would be liable to his customer ; as the alternative course to giving notice to the customer, allowed by the section, is that of giving notice to the parties liable on the bill, a duty which is not fulfilled by giving notice to some or one of them.

When to be given

The time allowances for giving notice, where a bill or cheque is in the hands of a bank for collection, are on a fairly liberal scale. By s. 49, sub-s. 13, the banker has the same time to give notice to his customer as if he (the banker) were the holder, and the customer, upon receipt of such notice, has himself the same time for giving notice as if the banker had been an independent holder. Moreover, where the instrument has been forwarded by one branch to another, or a branch to the head office, or vice versa, for collection, each such constituent of the entire bank is, for the purpose of giving notice of dishonour, regarded as a separate entity, and the same time allowed as if they were independent holders (*h*).

How to be given

As to the method of giving notice of dishonour, s. 49, sub-s. 6, enacts that

“ The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.”

Sir Mackenzie Chalmers' note (*i*) is :

“ This sub-section approves a common practice of collecting bankers which was previously of doubtful validity.”

Returning bill to customer

The usual and natural practice of collecting bankers would seem, however, to be to return the bill or cheque to their own customer ; and the sub-section does not appear very aptly framed for a complete authorisation of this practice. It does not cover the case of a bill or cheque payable, or by means of blank indorsement become payable, to bearer, of which the customer is the holder ; and therefore the return of such a document to the customer is not notice of dishonour within

(*h*) *Clode v. Bayley* (1843), 12 M. & W. 51 ; 3 Digest 208, 493 ; *Prince v. Oriental Bank Corporation* (1878), 3 App. Cas., at p. 332 ; 3 Digest 173, 301 ; *Fielding & Co. v. Corry*, [1898] 1 Q.B. 268 ; 3 Digest 208, 494.

(*i*) *Bills of Exchange*, 10th ed., p. 185.

the sub-section, which only applies where the customer is either drawer or indorser. Presumably indorsement for collection would be sufficient to constitute the customer an indorser within the provisions both of this sub-section and of s. 49, sub-s. 13.

The words 'return of a dishonoured bill' seem to point to the sub-section being confined to the bill or cheque being restored to the source whence it came; in the banker's case, to the customer. It might be doubted whether the mere transmission of the bill to a prior party, not the holder's immediate transferor, would be within these terms.

In any event such a course would be an undesirable one for the banker to adopt. There seems no reason why he should put the bill or cheque out of the possession of himself or his customer, the position of holder being essential if proceedings have to be taken on it, and at the very outset of those proceedings (j).

Method of communication

Save in the exceptional case of the return of the bill to a drawer or indorser, the notice must be given in writing or by personal communication (s. 49, sub-s. 5). It may be sent by post. Section 49, sub-s. 12 (b) clearly recognises this.

Notice by telegram

Notice by telegram would seem to be good. WILLES, J., appears to have doubted as to this in *Godwin v. Francis* (k); but in *Fielding & Co. v. Corry* (l), A. L. SMITH, M.R., expressed the opinion that such notice was sufficient.

When must be given

It is, however, to be noticed that, except in the case of personal communication, the crucial time is the sending, not the receipt, of the notice (s. 49, sub-s. 12). Thus, where the parties reside in different places, the notice must be sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter.

In *Fielding & Co. v. Corry*, there being convenient posts on the day following dishonour, a telegram sent the next day, though it arrived about the same time as a letter posted the previous day would have done, was held to be too late. Had a special messenger been despatched at any time during the day after dishonour, though he might have been far later in arriving, that would presumably have sufficed.

(j) *Lloyds Bank, Ltd. v. Dolphin* (1920), Court of Appeal, Times, December; 'Journal of Institute of Bankers', vol. xlii, p. 3.

(k) (1870), L.R. 5 C.P. 295, at p. 303; 12 Digest 132, 889.

(l) [1898] 1 Q.B. 268; 3 Digest 208, 494.

In that particular case notice of dishonour was posted by mistake to the wrong branch, and the telegram was sent to the right branch. It was held that this was equivalent to a re-direction of the letter, and that the notice was good ; but the decision seems open to criticism. In *London Provincial and South-Western Bank, Ltd. v. Buszard (m)*, an order to stop a cheque addressed to the wrong branch was held ineffective.

Whether notice by telephone good

No case has yet arisen as to the validity of notice by telephone. It might fairly be considered to come under the head of a personal communication, the actual voice being transmitted by the reciprocal vibrations of the discs induced by the current in the same way as by vibration of the air or intervening material in the case of ordinary speaking.

(m) (1918), 35 T.L.R. 142 ; 3 Digest 173, 303.

CHAPTER 18

THE PASS BOOK

THE last edition of this work bore a brief reference to an innovation by which some banks sent periodically to their customers loose leaves showing the state of the account from day to day, together with a wallet to file and keep them in, the avowed intention being to avoid the necessity of sending in the pass book. The plan has its merits, inasmuch as it goes to prevent the customer's saying he had no notice of the state of his account, but it eliminates that 'passing to and fro' which, as shown below, is the pass book's main claim to be an account stated, and from which it derives its name.

This relatively new type of account stated is treated later, but inasmuch as it has not yet replaced the old pass book, the latter is treated also. Besides, much that applies to the one is relevant also to the other.

The position of the pass book is most unsatisfactory. Its proper function is to constitute a conclusive, unquestionable, record of the transactions between banker and customer, and it should be recognised as such. After full opportunity of examination on the part of the customer, all entries, at least to his debit, ought to be final and not liable to be subsequently reopened, at any rate to the detriment of the banker.

It would be dangerous, however, to assume that such is the present effect of the pass book.

Decisions as to pass book

In *Devaynes v. Noble* (a), in 1816, the Court of Chancery directed an inquiry into the nature and effect of the pass book, and the report of the master is set out at length in the case.

Therein it is stated that, on delivery of the pass book to the customer, he

"examines it, and if there appears any error or omission, brings or sends it back to be rectified; or, if not, his silence is regarded as an admission that the entries are correct."

That finding was recognised and adopted by the Court, *ubi supra*, at p. 610.

In *Skyring v. Greenwood* (b), decided in 1825, a firm of bankers credited a military customer with certain sums of

(a) (1816), 1 Mer. 529, at p. 535.

(b) (1825), 4 B. & C. 281; 1 Digest 441, 1311.

money to which they supposed him to be entitled, but to which he was not really entitled, and which were never received by the bankers, who had, moreover, been officially informed of their mistake. They so credited him for five years, and communicated the credit to him by statements of account analogous to a pass book. On discovery of their error, they sought to retain, from subsequent moneys coming to their hands for his credit, an amount equivalent to that credited by mistake, which the customer had drawn out. It was held that they were not entitled to do this, the entries to credit being a representation that the money had been received for the customer's use, and the customer having, in reliance thereon, altered his position by spending more than he would otherwise have done.

This case goes to show that a credit entry may be regarded as a representation binding the bank, if the customer can show he has altered his position in reliance thereon. It was cited and approved by MATHEW, J., in *Deutsche Bank (London Agency) v. Beriro & Co. (c)*; by MATHEW and A. L. SMITH, JJ., in *R. v. Blenkinsop (d)*. It was cited, approved and forms the basis of decision by the Court of Appeal in *Holt v. Markham (e)*. In *Holland v. Manchester and Liverpool District Banking Co., Ltd. (f)*, LORD ALVERSTONE, C.J., said that the bank had the right to have the entry subsequently corrected, but not to dishonour cheques drawn on the faith of it, so long as it remained uncorrected, and awarded damages for dishonour of such cheques.

Rectification of errors

In the absence of any change of position, a mistaken credit entry may, probably, be rectified within reasonable time. In *Commercial Bank of Scotland v. Rhind (g)*, LORD CAMPBELL, L.C., said, at p. 648 :

"It would indeed be a reproach to the law of Scotland, if, there being satisfactory evidence that, by the mistake of a clerk, there had been in the pass book a double entry of the same sum to the credit of the respondent, the mistake could in no way be shown by the bank, and if he were entitled fraudulently to extort from them £80 beyond the amount of what is justly due to him."

In *British and North European Bank, Ltd. v. Zalstein (h)*, it was held that a fictitious entry in the pass book fraudulently made by an officer of the bank cannot be relied on by a customer who has not received notice thereof or acted thereon so as to alter his position—a pretty obvious conclusion.

And the reverse case must hold good. No amount of

(c) (1895), 73 L.T. 669 ; 1 Com. Cas. 255 ; 3 Digest 207, 487.

(d) [1892] 1 Q.B. 43 ; 35 Digest 163, 586.

(e) [1923] 1 K.B. 504 ; 35 Digest 157, 533.

(f) (1909), 25 T.L.R. 386 ; 3 Digest 222, 576.

(g) (1860), 3 Macq. 643 ; 3 Digest 247, 720.

(h) [1927] 2 K.B. 92 ; Digest Supp.

acquiescence on the part of the customer could justify a bank in withholding from him money really received for his credit, but omitted in the credit items of the pass book. The credit items are peculiarly within the knowledge and control of the banker, the debits within that of the customer. In *Commercial Bank of Scotland v. Rhind*, LORD CAMPBELL seems to imply that the bearing of the pass book may almost be divided in this way, that the items to the customer's credit bind the banker, those to his debit the customer. He says, at p. 651 :

"... on proof of its (the pass book's) having been in the custody of the customer, and returned by him to the bankers without objection being made to any of the entries by which the bankers are credited, I think such entries may be *prima facie* evidence for the bankers as those on the other side are *prima facie* evidence against them."

In the same case the Chancellor said, at p. 651 :

"These entries in the pass book, whether on the debtor or creditor side, are merely items in an account current afterwards to be examined, adjusted and 'fitted'. According to the mode of operating proposed, the customer might take a pair of scissors, and, cutting off all the items in which the bankers take credit for payments, give in evidence the other side of the account, and so make a *prima facie* case against the bankers to recover the full amount of all his payments into their hands."

In that case it was the customer's own contention that the whole pass book, or, at any rate, the items since the last making up, which items included the double entry in question, constituted only a current account ; and the House appear to have utilised this contention for rejecting his somewhat preposterous claim. They presumably did not mean to imply that the pass book, however many times it has been in the customer's hands in the interval between periodical making up of accounts, remains throughout that period a mere account current.

As a stated account

Anyway, other (some of them later) cases tend to establish it as a stated or settled account, not only after a yearly or half-yearly balance has been struck, but on each occasion when it is had out, with the balance, debtor or creditor, pencilled in, and returned by the customer without comment or objection. Unless it can be elevated to that position, it affords little protection to the banker. In *Shaw v. Dartnall* (i), agents, in a position similar to that of bankers, had furnished to the defendant a pass book containing entries of annuities purchased by and payable to him. The defendant had been debited therein with £100 as returned in respect of an annuity to the Duke of Marlborough.

The Court said :

(i) (1826), 6 B. & C. 56 ; 3 Digest 246, 715.

"As to the sum of £100, in respect of the Duke of Marlborough's annuity, I think that the defendant would be entitled to retain that sum, . . . unless there was evidence of his assent to its being replaced to his debit. The entry is 'half a year's annuity, due to the 10th of July, returned £100'. The evidence of his assent to that entry is this, that on the 13th of November, 1818, the account is made up, and a balance of £48 15s. 9d. struck. In March, 1819, another account is made up and a balance struck, and the sum of £100 continuing debited to him. I do not rely upon the ultimate balance struck on the 21st of May, 1820, because there was no distinct evidence of the defendant's assent generally to the whole contents of the entry of that date. But, on the ground that there was a previous assent by him . . . when the two settlements of accounts took place, I am of opinion that that sum was properly placed to his debit, and must be allowed." (j)

In *Blackburn Building Society v. Cunliffe, Brooks & Co. (k)*, in the Court of Appeal, LORD SELBORNE, delivering the judgment of the Court, said :

"Nor can they (the bankers) have the benefit of the doctrine that a pass book passing to and fro is evidence of a stated and settled account ; because, if the directors of this society could not borrow money, they could not ratify an illegal borrowing simply by returning a pass book."

The doctrine of the pass book being a stated and settled account is here treated as acknowledged and unquestionable.

Vagliano's case *

Vagliano Brothers v. Bank of England (l) is probably the most favourable of the English cases to the banker's side of the question, especially as it indicates the means by which bankers may establish and fortify their position, and neutralise the effect of the adverse decisions to be presently referred to, notably *Chatterton v. London County Bank (m)*. In *Vagliano's Case*, in the Court of Appeal (n), it was contended as follows :

"The plaintiff received his pass book half-yearly, containing entries debiting the payments made for him, for which the paid bills were sent as vouchers ; these bills were retained by the plaintiff and the pass books returned by him without objection. This amounted to a settlement of account, which cannot now be reopened, especially considering the negligence of the plaintiff with regard to the examination of these vouchers."

In the judgment of the five concurring Lords Justices, they say (at p. 263) with regard to this contention :

"There is another point to be considered. The plaintiff from time to time received from the bank his pass book, with entries debiting the payments made, for which the bank sent the bills as vouchers, which were retained by the plaintiff when he returned, without

j) Cf. *Woods v. Thiedemann* (1862), 1 H. & C., at p. 492, *per* Martin, B. ; 3 Digest 251, 741.

(k) (1882), 22 Ch. D., at pp. 71, 72, 3 Digest 243, 696.

(l) (1889), 23 Q.B.D. 243 ; reversed *sub nom.* *Bank of England v. Vagliano Brothers*, [1891] A.C. 107 ; 3 Digest 244, 703.

(m) (1891), *Times*, January 21st ; 3 Digest 244, 701.

(n) 23 Q.B.D., at p. 245.

objection, the pass book. It was contended that this was a settlement of account between him and the bank, and that he had been guilty of such negligence with respect to the examination of the vouchers as would have prevented him from being relieved from the settlement of account. But there was no evidence to show what, as between a customer and his banker, is the implied contract as to the settlement of account by such a dealing with the pass book, or that, having regard to the ordinary course of dealing between a banker and his customers, the plaintiff had done anything which can be considered a neglect of duty to the bank or negligence on his part."

It is true that the decision of the Court of Appeal was reversed by the House of Lords (*o*), but it was so on grounds not affecting this part of the judgment. This is admitted by BRAY, J., in *Kepitigalla Rubber Estates, Ltd. v. National Bank of India, Ltd.* (*p*). There are, indeed, passages in the judgments in the House of Lords which recognise, as a matter of law and common sense, that the pass book must have some effect, and the customer some duty and obligation with regard to it and returned cheques and bills.

LORD HALSBURY, in enumerating the circumstances which influenced the bank, says (*p*. 115) :

"The false documents were paid, duly debited to the customer, and duly entered in his pass book, and, so far as the banker could know or conjecture, brought to his knowledge on every occasion upon which the payment was made and the bills returned."

Again, he says (*p*. 116) :

"Was not the customer bound to know the contents of his own pass book?"

LORD SELBORNE (at *p*. 128) speaks of the dealings with the pass book as calculated to disarm suspicion on the part of the bank.

As matter of evidence

The main value of the judgment of the Court of Appeal is the intimation that the effect of the pass book, and the duty of the customer with regard to it and the returned cheques and bills, are matters of evidence showing what is the implied contract between banker and customer, based on the custom of bankers. For their own protection, bankers should co-operate to formulate such custom, establishing the status of the pass book as a settled account, and affirming the duty of the customer to examine and compare it with the returned cheques and bills, and notify the bank of any errors therein appearing. It really seems little more than recognising and consolidating what one would have said was the common understanding on the subject; and it would be matter for sincere regret if the evidence suggested by the Court of Appeal were not forthcoming on a future occasion.

(*o*) [1891] A.C. 107; 3 Digest 244, 703.

(*p*) [1909] 2 K.B. 1010; 3 Digest 245, 704.

The decision further recognises the principle that if the pass book be regarded as a settled account, and there be a duty on the part of the customer with regard to it and the returned documents, the omission of that duty will constitute negligence, sufficient to estop the customer from reopening the account to the detriment of the bank.

Present state of the question

In the meantime, and until evidence of the nature suggested by the Court of Appeal is forthcoming, but little reliance can be placed on the pass book as precluding a customer from disputing debits which have appeared in the book both when delivered to him and returned by him without objection, or from denying the genuineness of his signature to cheques which represent such debits, and have been returned paid with the book and retained by the customer without comment.

If the case of *Chatterton v. London County Bank* (pp) is to be accepted as laying down the law on the subject, it is difficult to see what is the object of the pass book from the banker's point of view, seeing that its effect is therein reduced to a minimum, and any duty on the part of the customer expressly negatived. That case, in all its stages, is fully reported in *The Miller* newspaper, and there only. The plaintiff banked with the defendant bank. Between September, 1887, and August, 1888, cheques were presented to the defendants, and paid, purporting to have been drawn by the plaintiff's authority and signed by him. The plaintiff called, or sent, for his pass book every week, and it was given to him made up to date, with the cheques paid in the interval in the pocket. He usually compared the entries in the pass book with the bank account in his ledger, and ticked off the items in the former before returning it to the bank.

In or about August, 1888, the plaintiff discovered that to twenty-five of these cheques his signature as drawer had been forged, and he claimed to have the amount of them replaced to his credit at the defendant bank. At the first trial, the jury found that :

1. the cheques were not forged ;
2. the plaintiff's conduct contributed to the loss (q).

A Divisional Court granted a new trial (r).

There is nothing of particular importance in the Divisional Court proceedings, the new trial being granted mainly on the ground that the trial below was unsatisfactory. The bank appealed. The Court of Appeal dismissed the appeal (s).

(pp) (1891), *Times*, January 21st ; 3 Digest 244, 701.

(q) "The Miller", May 5th, 1890, p. 100.

(r) "The Miller", July 7th, 1890, p. 177 ; *Times*, June 27th, 1890, p. 3.

(s) "The Miller", November 3rd, 1890, p. 394, where the proceedings are reported *verbatim*.

Counsel for the bank said that the plaintiff usually in person took the paid cheques and the pass book away from the bank, and his ticking off the items authorised the bank to go on paying, and admitted to the bank that the signatures were his. LORD Esher, M.R., expressed dissent and said :

"It is a hundred to one that they never looked at the pass book. Why should they look to see whether or no he made ticks against the cheques?"

It is to be noticed that the main contention on behalf of the bank in this case was that, by recognising the payment of past forged cheques, the plaintiff authorised or induced the bank to pay the subsequent forged cheques. That contention does not seem a strong one. The bank pay each specific cheque because they believe the signature to be genuine, and preceding transactions have little or nothing to do with succeeding ones. It has been held that even the conscious payment of a bill to which the payer's signature has been forged does not estop him from setting up that a subsequent bill is forged by the same hand, unless a course of business is established amounting to authority to use the name (*i*). The stronger line, that of settled account, which the customer, by his negligence and the resultant damage to the bank, is estopped from reopening, does not seem to have been put forward, at any rate prominently.

Lord Esher's views

But the subsequent remarks of LORD Esher militate quite as much against this contention. If there is no duty on the part of the customer to examine and compare the pass book and paid documents, there can be no negligence in his not doing so, and so no ground of estoppel could arise, even admitting the pass book to constitute a settled account. The following is the material part of the argument. Counsel for the bank said he relied on the plaintiff's receipt of the cheques week by week, and his ticking the pass book opposite the bank's payments, as indicating that things were correct.

Lord Esher : "Suppose he never looked at the pass book?"

Lopes, L.J. : "What is the object of the book?"

Counsel : "That he may examine it and see the state of his account."

Lord Esher : "That may be. But supposing he does not do what he has a right not to do, how can that be relied on?"

Counsel : "The plaintiff might have been entitled to say, 'I decline to give you any assistance; if it is my signature, pay; if not, you will not be authorised in paying.' But if he does not take up a merely negative position; if he says to the bank, either by language or conduct, 'That is my signature—'"

Lord Esher, interrupting : "Is everybody at liberty to send for his bank book week by week?"

Counsel : "Yes; and, in the ordinary course of business, he does this in order to see that it is right."

Lord Esher : " I do not know that he does."

Counsel : " In any event, the point is a matter for the jury."

Lord Esher : " But you must not put a burden on people the law never placed on them ; you are putting on them the burden of saying, ' Look through the pass book.' "

Lopes, L.J. : " I cannot help thinking the pass book is sent for the purpose of examining it."

Lord Esher : " But he is not bound to look at it."

Counsel : " If he sends for it week by week, the bank are reasonably justified in coming to the conclusion that it is examined, and that they are checked in their payments."

Lord Esher : " I do not know that they are. That is putting a burden on the bank [*sic* in " The Miller" report, but clearly must be, as before, ' on people,' or ' on the customer'], which you have no right to do, and which would interfere with business all over the country. If the mere fact is to give the bank any right at all, we are putting a burden on the customer, which I feel very much disinclined to do."

Counsel : " He goes for it himself."

Lord Esher : " But has the bank a right to infer anything from it ? A hundred things may happen to prevent him from looking into it when he has got it, and what right has the bank to infer that he has looked into it ? "

No formal judgment was given, the appeal being simply dismissed.

New trial

On the new trial (*u*), MATHEW, J., in summing up to the jury, told them that the questions were, whether the cheques were forgeries and whether the bank were misled by the plaintiff's conduct, and had the plaintiff, by his conduct, disentitled himself to recover from the bank. He said there was no contract between the bank and the customer with regard to the pass book. If the bank had proved they were misled, and they had not done so, could it be said that the plaintiff had done anything wrong because he conducted his business in his own way ? People in business were not always guarding against fraud, but against mistakes. Supposing the plaintiff had told the clerk, who, it was suggested, had forged the cheques, to examine the pass book and compare the returned cheques with it and the counterfoils, would the bank have had any right to complain ? And yet, in that case, the frauds would not have been discovered any sooner in the ordinary course of events.

The jury found all the questions in favour of the plaintiff, and judgment was given against the bank.

Here, again, the settled account aspect of the pass book does not seem to have been put forward, but the remarks of MATHEW, J., like those of LORD ESHER, would be equally fatal to any contention based on that ground.

Right of delegation

The point introduced by MATHEW, J., as to the right of the

(*u*) (1891), Times, January 21st ; " The Millor ", February 2nd, 1891 ; 3 Digest 244, 701.

customer absolutely to delegate all examination of the book and returned documents to another, thereby escaping all liability, is no doubt productive of some difficulty. A certain amount of delegation is essential in business ; and, in ordinary cases, a man is perhaps not expected to anticipate fraud and forgery on the part of those he has no reason to suspect. Recognition of the right to delegate the examination to a subordinate, free from any supervision, is, however, so destructive of any protection to the banker that the more reasonable view would seem to be that it is part of the customer's duty to his banker not to leave this matter to the uncontrolled management even of a confidential clerk. There is such a thing as negligence by unreasonable trust (w). In *London Joint Stock Bank, Ltd. v. Macmillan and Arthur (y)*, LORD HALDANE, at page 821, said :

"I am of opinion that in putting as much as they did within his power they took the risk of failure in the discharge of their duty to the bank of which they were customers."

And there are *dicta* to the effect that such absolute delegation by a customer does not enable him to plead entire ignorance of the state of his banking account (z).

In *Morison's Case*, PHILLIMORE, L.J., said, at p. 385 :

"As to knowledge, it is unnecessary to decide what inference should be drawn when a principal knows so much that it is a policy of an ostrich to know no more. I am not sure that in that case we can altogether rely upon the doctrine that for this purpose means of knowledge are not the same as knowledge."

That, however, was a somewhat extreme case.

In formulating the custom and evidence hereinbefore referred to, this matter should be borne in mind, and the customer's obligation defined as, either himself to examine the pass book and the returned articles, or, if he delegate the duty, to exercise such supervision over the person performing it as to render the combined operation equivalent to a personal investigation.

In *Kepitigalla Rubber Estates, Ltd. v. National Bank of India, Ltd. (a)*, the question of the pass book was again raised. BRAY, J., referred to *Chatterton v. London County Bank (aa)* as follows :

"One of the cases there (Paget's Law of Banking) referred to, *Chatterton v. London County Bank*, on page 156, appears only to be reported in the *Miller* newspaper of November 3, 1890. . . . That is not, of course, an authorised report, but one cannot read it without being impressed by the fact that it must have correctly stated Lord Esher's language. At all events, the language used seems very good

(w) See *per* ERLE, C.J., in *Re North British Australasian Co., Ltd., Ex parte Swan* (1860), 7 C.B.N.S., at p. 436.

(y) [1918] A.C. 777 ; 3 Digest 233, 644.

(z) *Jacobs v. Morris*, [1902] 1 Ch., at p. 831 ; 1 Digest 303, 282.

(a) [1909] 2 K.B. 1010 ; 3 Digest 232, 636.

(aa) (1891), *Times*, January 21st ; 3 Digest 244, 701.

sense. The new trial of that case was reported in *The Times* of January 21, 1891, as well as in the *Miller* of February 2, 1891, and the observations of Mr. Justice Mathew . . . are most pertinent, and, as it seems to me, most sound."

And in concluding a long and careful judgment against the bank, the learned Judge said :

" Apart from authority, one has only to look at the facts of this case to see how absurd it would be to hold that the taking out of the pass book and its return constituted a settled account. It would mean this, that a secretary of a company by going to the bank for his own purposes in order to prevent the discovery of his own fraud, and without knowledge on the part of any of the directors and getting the pass book (with a pencil entry in it of the balance), can bind the company for all purposes."

This decision of BRAY, J., was approved and followed by CHANNELL, J., in *Walker v. Manchester and Liverpool District Banking Co., Ltd.* (b).

AMERICAN DECISIONS (bb)

American decisions are so far in advance of our own that to digress by way of a treatment of the matter from the American standpoint needs no excuse.

Leather Manufacturers' National Bank v. Morgan

Leather Manufacturers' National Bank v. Morgan, in 1885, is a decision of the Supreme Court of the United States, reported 117 U.S. 96. In that case, the amount of genuine cheques was fraudulently raised by a confidential clerk. The frauds covered about six months, during which the customer had back his pass book and paid cheques three times. The customer made some examination of his cheque book and counterfoils, with a view to checking roughly his bank balance, but he does not seem to have, in any real sense, examined his pass book or the returned cheques ; and the clerk, by manipulating the addition of the counterfoils, a duty entrusted to him, evaded, for a time, discovery of the fraud. The customer admitted that if, on any of the three occasions, he had compared the pass book with the counterfoils, he must have discovered that his account had been charged with the raised cheques.

The judge of first instance decided against the bank on the ground that the customer was under no duty whatever to the bank to examine his pass book and the vouchers returned with it, in order to ascertain whether his account was correctly kept. The Supreme Court held that this view of the customer's obligation was not consistent with the relations of the parties or with principles of justice. They said that the sending of

(b) (1913), 108 L.T. 728 ; 3 Digest 232, 637.

(bb) For a fuller treatment see *Paton's Digest of Legal Opinions*, vol. ii, under the head '*Forged Paper*,' at pp. 1872-1882 (American Bankers' Association, New York City, 1942).

the pass book by the customer to be written up and returned with the vouchers is a demand on his part to know what the bank claims to be the state of his account ; that the return of the book with the vouchers is the answer to that demand and imports a request by the bank that the depositor will, in proper time, examine the account so rendered and either sanction or repudiate it. The Court then quoted the report to the English Court of Chancery in *Devaynes v. Noble* (c), ante, p. 344, and said that that report, made in 1816, was equally applicable, both in England and America, and continued, at p. 107 :

"The depositor cannot, therefore, without injustice to the bank, omit all examination of his account when thus rendered at his request. His failure to make it or to have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a pass book."

Later on the Court said, at p. 107 :

"Without impugning the general rule that an account rendered, which has become an account stated, is open to correction for mistake or fraud, other principles come into operation where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself or to have it made in good faith by another for him ; by reason of which negligence the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection, which he could and would have taken had such notice been given. In other words, parties to a stated account may be estopped by their conduct from questioning its conclusiveness."

The Court further indicated another respect in which the position of the bank might be regarded as altered and prejudiced by the non-discovery and non-communication of the frauds. They said, at p. 114 :

"Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps by the arrest of the criminal or by an attachment of his property or other form of proceeding to compel restitution. It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. . . . An inquiry as to the damages in money actually sustained by the bank, by reason of the neglect of the depositor to give notice of the forgeries, might be proper if this was an action by it to recover damages for a violation of his duty. But it is a suit by the depositor, in effect, to falsify a stated account, to the injury of the bank, whose defence it is that the depositor has, by his conduct, ratified or adopted the payment of the checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration . . . was, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly and, it may be, effectively exercising it."

This view is strengthened by the fact that much the same consequences have affected English decisions as to what alteration in the position of a bank would fix a customer with adoption of a forged cheque or bill, when, having knowledge thereof, he failed to communicate such knowledge to the bank (*d*).

The same standard of alteration of position seems at least as applicable where it is sought to reopen a settled account.

Critten v. Chemical National Bank of New York

To the same effect is the judgment in *Critten v. Chemical National Bank of New York*, a decision of the Supreme Court of New York in 1902, reported 171 New York Reports, 219, approved in 1935 in *Frederic A. Potts & Co., Inc. v. Lafayette National Bank of Brooklyn (e)*. The Court there said, at p. 228 :

“ If the depositor has, by his negligence in failing to detect forgeries in his checks and give notice thereof, caused loss to his bank, either by enabling the forger to repeat his fraud or by depriving the bank of an opportunity to obtain restitution, he should be responsible for the damage caused by his default.”

They dwelt particularly upon the duty of the customer to utilise his counterfoils, saying, again at p. 228 :

“ Considering that the only certain test of the genuineness of the paid checks may be the record made by the depositor of the checks he has issued, it is not too much, in justice and fairness to the bank, to require of him, when he has such a record, to exercise reasonable care to verify the vouchers by that record.”

Constructive knowledge

The duty of the customer with regard to the pass book was further emphasised by the Supreme Court of the United States in the *Leather Manufacturers' National Bank Case*, *ubi supra*, by the way in which they treated neglect on his part of the means of knowledge afforded by the pass book and the returned documents as equivalent to actual knowledge on his part, in order to fix him with adoption of the forged cheques.

After quoting LORD CAMPBELL's decision in *Cairncross v. Lorimer (f)*, which enunciates the principle of adoption, but predicates full notice of the act which is adopted, they said, at p. 113 :

“ This, however, could not be if, as claimed, the depositor was under no obligation whatever to the bank to examine the account rendered at his instance and notify it of errors therein in order that it might correct them, and, if necessary, take steps for its protection by compelling restitution by the forger. But if the evidence showed that the depositor intentionally remained silent after discovering the

(d) *Ogilvie v. West Australian Mortgage and Agency Corporation, Ltd.*, [1896] A.C., at p. 270; 3 Digest 231, 634; *M'Kenzie v. British Linen Co.* (1881), 6 App. Cas. 82; 3 Digest 236, 658; *Ewing (William) & Co. v. Dominion Bank*, [1904] A.C. 806; 3 Digest 236, 661.

(e) 269 N.Y. 181; 199 N.E. 50.

(f) (1860), 3 Macq., at p. 830; 21 Digest 328, 1227.

forgeries in question, would the law conclusively presume that he had acquiesced in the account as rendered and infer previous authority in the clerk to make the checks, and yet forbid the application of the same principle where the depositor was guilty of neglect of duty in failing to do that in reference to the account which he admits would have readily disclosed the same fraud? It seems to the Court that the simple statement of this proposition suggests a negative answer to it."

In *Critten v. Chemical National Bank of New York* (*ubi supra*), the Supreme Court of New York said, at p. 228:

"While we hold that this duty rests upon the depositor, we are not disposed to accept the doctrine asserted in some of the cases that by negligence in its discharge, or by failure to discover and notify the bank, the depositor either adopts the checks as genuine and ratifies their payment or estops himself from asserting that they are forgeries."

The actual outcome of that case shows that this must only be read as discountenancing the idea that such adoption or estoppel is absolute despite the fact that the particular loss was due to failure of duty on the part of the bank rather than on that of the customer. If a bank is negligent in detecting fraud, or when the bank fails to observe a limitation on the agent's drawing power, the depositor may recover and will not be estopped despite his own failure properly to examine the bank's statement (g). Failure to exercise due and reasonable care to detect forgery entails a similar result (h). *Critten's Case* was decided on adoption; two cheques were allowed the plaintiff because they were paid before he had his pass book and vouchers, and the clerk had been arrested and punished; the next three were allowed the bank, on the ground that Critten ought to have discovered the forgery of the previous ones and warned the bank; the sixth and subsequent ones were disallowed the bank, because the sixth was clumsily forged and should have put the bank on inquiry. Anyway, both Courts treat knowledge imputable from neglect as equivalent to actual knowledge. It is immaterial whether it is treated as ground for holding the account conclusive or the cheques adopted.

These two cases are still leading authorities in the United States. They were freely cited and approved in *Morgan v. United States Mortgage and Trust Co.* (j), by the New York Court of Appeals, consisting of six judges. In this case, the Court said (p. 228):

"... the depositor who sends his pass book to be written up and receives it back with his paid checks as vouchers is bound to examine the pass book and vouchers and to report to the bank without unreasonable delay any errors which may be discovered."

(g) *Leather Manufacturers' National Bank v. Morgan* (see p. 353, *ante.*); *First National Bank v. Farrell* (D.C.) 272 F. 371; *Irving Trust Co. v. National City Bank* (C.C.A.) 78 F. (2d.) 665.

(h) *Illinois Tuberculosis Association v. Springfield Marine Bank*, 282 Ill. App. 14; *Franklin v. Bank of America National Trust and Savings Association* (Col. App.) 55 P. (2d.) 232.

(j) (1913), 208 N.Y. 218.

And again (p. 224) :

“Negligence in this case means the neglect to do those things dictated by ordinary business customs and prudence and fair dealing towards the bank which, if done, would have prevented the wrongdoing which resulted from the omission.”

Duty of customer recognised by American courts

The main point to be noticed up to this stage is the unqualified manner in which the Supreme Court of the United States affirm that duty of the customer with regard to the pass book which was denied by LORD ESHER and other English judges.

The note beginning the reference to *Frederic A. Potts & Co., Inc. v. Lafayette National Bank of Brooklyn* (k), decided in 1935, in 103 American Law Reports Annotated, 1147, is succinct. After referring to 15 A.L.R. 159 and 67 A.L.R. 1121, it says : “The later decisions support the general rule that it is the duty of a depositor in a bank to examine the balanced pass book, statement of accounts, or cancelled checks returned to him by the bank, within a reasonable period after receiving them, and to report to the bank any forgeries or other discrepancies in the amounts which he may discover.”

Coleman Drilling Co. v. First National Bank (l) went so far as to say that when it was the practice of the bank to prepare statements for its customers and the customers knew of it, it was their duty to obtain and examine the statements within a reasonable time. This responsibility was, however, denied by the Court in *Dow v. Stockport Savings Bank* (m). That an account rendered by the bank becomes an account stated when the depositor fails, without reasonable excuse, promptly to examine the statement and returned cheques and to report any discrepancy, has been stated time and time again (n). The failure must have proximately caused the negotiation of the forged cheques (o) ; and the depositor becomes estopped to deny its conclusiveness (p).

As to wilful ignorance, the English authorities show symptoms of coming into line with the American. “Is not negligent ignorance as bad as knowledge ?” said LORD BLACKBURN (q). LORD SELBORNE in *M^cKenzie v. British Linen Co.* (r), speaks

(k) 269 N.Y. 181 ; 199 N.E. 50.

(l) (1923), (Tex. Civ. App.) 252 S.W. 215.

(m) (1926), 202 Iowa 594 ; 210 N.W. 815.

(n) *General Petroleum Products v. Merchants' Trust Co.* (1932), 115 Conn. 50 ; 160 A. 296 ; *First National Bank v. Patty* (1933), (Tex. Civ. App.) 62 S.W. (2d.) 629.

(o) *Sommer v. Bank of Italy Nat. Trust and Savings Assoc.* (1930), 109 Cal. App. 370 ; 293 P. 98.

(p) *Whitney Trust and Sav. Bank v. Juergens Fowler Co.* (1934), 180 La. 445 ; 156 So. 460 ; (Tex. Civ. App.) 62 S.W. (2d.) 629.

(q) *R. v. Williams* (1884), 9 App. Cas. 418, p. 420.

(r) (1881), 6 App. Cas. 82, at p. 92 ; 3 Digest 236, 658.

of 'reasonable grounds to believe' as tantamount to knowledge (s).

The *Morison Case* was exceptional. The admissions of the plaintiff, his clemency to the culprit and financial arrangements with him, the fact that he employed independent auditors, who were not called at the trial ; all this deprives the case of value as a precedent. Still, the following passage from the judgment (p. 385) of PHILLIMORE, L.J., seems worth quoting in this connection :

"As to knowledge, it is unnecessary to decide what inference should be drawn when a principal knows so much that it is a policy of an ostrich to know no more. I am not sure that in that case we can altogether rely upon the doctrine that for this purpose means of knowledge are not the same as knowledge."

Cf. *Marsh v. Keating* (t).

DELEGATION OF DUTY

Delegation of duty of customer

The question of delegation is determined in favour of the banker by the American Courts in two of the above-mentioned cases. In the *Leather Manufacturers' National Bank Case*, the Supreme Court of the United States say :

"But when . . . the agent commits the forgeries which misled the bank and injured the depositor, and therefore has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination, without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily on the principal cannot be deemed the equivalent of performance by the latter."

This seems a fair and reasonable view. If a man has a duty to perform, not absolutely necessitating its entire fulfilment by himself personally, he may delegate it to another, but subject to its being satisfactorily and properly carried to a conclusion ; and for the accomplishment of this he remains ultimately responsible. The mere telling another to do a thing cannot be regarded as the equivalent of doing it. If the duty is to make reasonable examination of the pass book and returned documents, the labour may be divided by relegating the mechanical part to a subordinate, subject to efficient supervision on the part of the principal ; their united work being fairly considered as effective as the unaided efforts of the

(s) Cf. *per* LORD WATSON in *Scholfeld v. Londesborough (Earl)*, [1896] A.C., at p. 543 ; 6 Digest 384, 2518 ; *White v. Steadman*, [1913] 3 K.B. 340 ; 3 Digest 114, 382. See also *Jacobs v. Morris*, [1902] 1 Ch., at p. 831 ; 6 Digest 110, 751.

(t) (1834), 1 Bing. N.C. 198 ; 3 Digest 124, 19.

principal. Without such supervision this is obviously not the case. This view was adopted in *Frederic A. Potts & Co., Inc. v. Lafayette National Bank of Brooklyn* (u) : a bank is exonerated from liability to a depositor for the proceeds of cheques indorsed to the bank for deposit to its credit but diverted by an employee of the depositor to his own account, by the depositor's failure to give notice that the cheques were not being credited, where an examination of the monthly statements rendered by the bank would have disclosed that the cheques had not been credited to the depositor ; and failure to give notice is not excused by the fact that examination of the statements was delegated to the dishonest employee. As before stated (p. 352), LORD HALDANE in *London Joint Stock Bank, Ltd. v. Macmillan and Arthur* said :

" I am of opinion that in putting so much . . . within his (a subordinate's) power they took the risk of failure in the discharge of their duty to the bank of which they were customers."

This seems relevant to the present point.

In *Critten v. Chemical National Bank of New York*, *ubi supra*, the Court enunciated a very ingenious doctrine on this question of delegation. They said, at p. 230 :

" Of course the knowledge of the forgeries which Davis (the fraudulent clerk to whom the duty of examination had been entrusted by the customer) possessed, from the fact that he was himself the forger, was in no respect to be attributed to the plaintiffs. But we see no reason why they were not chargeable with such information as a comparison of the checks with the check-book would have imparted to an innocent party previously unaware of the forgeries. The plaintiffs' position may be no worse because they intrusted the examination to Davis instead of to a third person, but they can be no better off on that account. If they would have been chargeable with the negligence or failure of another clerk in the verification of the accounts, they must be equally so for the default of Davis, so far as the examination itself would have disclosed the facts."

It may be doubtful whether an English Court would adopt this idea of, so to speak, filtering the knowledge of the fraudulent subordinate ; it has at present no counterpart in English law.

Principle to be adopted

The simpler method seems to be to adhere to the principle of the pass book being a settled account, to insist on the duty of the customer to examine and compare it with the returned cheques and counterfoils, or to have that duty performed under effective supervision, and treat the omission of such duty as negligence or imputed knowledge, estopping the customer from reopening the account if the bank were shown to have been prejudiced thereby ; such prejudice consisting in the deprivation

of opportunity of self-protection or the loss of any remedy, civil or criminal, against the offender, it being immaterial whether the civil remedy would have been likely to produce satisfactory results or not.

The difficulty in the way of establishing this position lies mainly in the *dicta* of LORD ESHER and MATHEW, J., in *Chatterton v. London County Bank* (v) and the judgments of BRAY, J., and CHANNELL, J., previously referred to. To overcome this, the banker must rely upon the expressions of the five Lords Justices in *Vagliano's Case*, supplemented by evidence of the nature specified in those expressions, and utilising, at least by way of argument, the conclusions of the American Courts of which those above mentioned are typical.

It must not be forgotten that if LORD ESHER's view is correct, and there is no obligation whatever on the customer to look at his pass book, this would be fatal to the assumptions of acquiescence in course of business, charges for interest and commission, and the like, which have been hitherto deduced from the return, without comment, of the pass book in which such items figure. The judicial recognition of such deductions affords further ground for questioning the soundness of LORD ESHER's views.

MORAL DUTY

Another consideration should be helpful in the matter. There is in recent law a tendency to enlarge the sphere of duty, breach of which may preclude a man from asserting his strict legal rights. Failure to fulfil a moral duty has been recognised as having this effect. In *M'Kenzie v. British Linen Co.* (w), M'Kenzie was not a customer of the bank, though he is referred to as such in *Ogilvie v. West Australian Mortgage and Agency Corporation, Ltd.* (y). The duties attributed to him, therefore, were purely moral ones; but the House of Lords attached to the breach of them the same consequences as if they had been strictly legal duties. In *Ogilvie v. West Australian Mortgage and Agency Corporation, Ltd.*, the Judicial Committee refer to 'the rules of fair dealing between man and man' as capable of imposing a duty from a customer to his banker. Dealing with estoppel in the course of his judgment in *Greenwood v. Martins Bank, Ltd.* (z), GREER, L.J., commends this statement. He cites *London Joint Stock Bank, Ltd. v. Macmillan and Arthur* (a), and continues:

"I cannot conceive a stronger case for saying that there is a duty

(v) (1891), *Times*, January 21st; 3 Digest 244, 701.

(w) (1881), 6 App. Cas. 82; 3 Digest 236, 658.

(y) [1896] A.C., at p. 268; 3 Digest 231, 634.

(z) [1933] A.C. 51; Digest Supp.

(a) [1918] A.C. 777; 3 Digest 172, 293.

required of the customer by 'the rules of fair dealing between man and man' (LORD WATSON, *Ogilvie v. West Australian Mortgage and Agency Corporation, Ltd.*) (b) to inform the bank of the existence of forged cheques when he knows that the bank are relying on the validity of the forged cheques."

In *Ewing (William) & Co. v. Dominion Bank (c)*, Ewing & Co., whose name was forged, were not customers of the bank, and the whole judgment of the Canadian Courts, practically affirmed by the Privy Council's refusal to give leave to appeal and the expressions used in so refusing, was based on the moral duty laid on a man, who knows or has reasonable ground to believe his name has been forged to a negotiable instrument, to give speedy notice to anyone likely to be injured thereby (d). It is surely not too much to contend that, with the materials ready to his hand, it is at least the moral duty of the customer to pay some heed to his banker's interests in this respect.

In *Brighton Empire and Eden Syndicate v. London and County Bank*, ante, p. 167, the bank was held liable for negligence in allowing the servant of the customer to make entries of sums and dates in the pass book and not checking such entries. That was an exceptional case, but it points to a duty with regard to the pass book on the part of the banker which ought to be reciprocal.

In *Morison v. London County and Westminster Bank, Ltd. (e)*, a certain measure of effect was accorded to the pass book as a factor in neutralising negligence on the part of the collecting bank. See under 'The Collecting Banker'.

Degree of care requirable from customer

As to the degree of care, in examining the pass book and vouchers, which may be reasonably expected from the customer, he clearly cannot be required to take such minute precautions as to exclude all possibility of forgery or fraud. He is not bound to resort to microscopical or chemical tests. In inspecting the pass book he would probably at once recognise the majority of the debits as representing cheques he recollected drawing, or periodical payments he had directed the banker to make; in case of an item he could not at once identify he should refer to the returned cheque and, if that failed to recall the transaction, to the counterfoil; if that, too, failed to suggest the occasion, he should examine the cheque narrowly, and if any suspicion remains, which he cannot satisfy by inquiry, he should communicate the matter to his banker.

This seems a rough outline of what a reasonable man would do if his own interests were involved, the test to be applied when the performance of a duty to another to take reasonable care is in question.

(b) [1896] A.C., at p. 269; 3 Digest 231, 634.

(c) [1904] A.C. 806; 3 Digest 236, 661.

(d) See 35 S.C.R. 133; 7 O.L.R. 90.

(e) [1914] 3 K.B. 356; 3 Digest 242, 690.

Estoppels do not bind the Crown ; and it has been held in Canada that a government department cannot be held to have adopted debits by means of the pass book. See *R. v. Bank of Montreal (f)*, where all the English cases as to estoppel against the Crown are cited.

MACHINED STATEMENTS

The growing practice of banks to send their customers periodically, or as often as desired, loose-leaf statements showing the debits and credits to the customers' accounts and their balance day by day, needs special treatment only from the standpoint that the statements are not intended to be returned to the bank. The original essential characteristic of the pass book, the passing to and fro, is therefore absent. In *Blackburn Building Society v. Cunliffe, Brooks & Co. (g)* LORD SELBORNE spoke of this 'passing to and fro', and most of the earlier cases contemplated it. It is mainly this feature which lends colour to the argument that a pass book is an account stated. The argument of this chapter in favour of endowing the pass book with the attribute of an account stated is perhaps slightly less strong in the case of loose-leaf statements, which are not returned to the bank. Some banks attach a slip on which the customer is asked to acknowledge that the balance stated therein is correct, but the customer is under no duty to comply and loses nothing by paying no heed. Fraud is less easy than with the pass book and the machined statement has many advantages for the banker. But his liability *vis-à-vis* the customer is the same as in relation to the pass book.

(f) (1906), 11 O.L.R. 595 ; affirmed, 38 S.C.R. 258 ; 21 Digest 298, 1072v.
(g) (1882), 22 Ch. D. 61 ; 3 Digest 243, 696.

CHAPTER 19

SECURITIES FOR ADVANCES

SUMMARY—

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THE making of loans or advances, apart altogether from the casual overdraft, is a prominent and profitable function of banks. Such operations, on the scale to which they have now attained, can hardly be regarded as within the ordinary sphere of banking law. It seems like a return to mediaeval times to note that in 1897 it required the decision of a court to establish that a man was still a 'customer' though he was overdrawn. The banker's lien, his only exceptional security, would be a poor resort for some of the advances now made by banks. Save for this lien and a casual statutory provision here and there, the law has, apart from the Bills of Exchange Act, no special attitude towards the banker; he stands on the same footing as the financier or private lender. And so it is the law affecting the security and dealings with it, not the personality of the lender, that has to be considered. By virtue of its permanency, land has always been the leading security for money lent, utilised as such by mortgage, legal or equitable. The law as to land itself is the accumulation of centuries: a legal mortgage is and must always remain a highly technical document, to say nothing of the necessary preliminaries for its creation; an equitable mortgage, professedly simpler, has its own limitations and pitfalls. Since the third edition of this book was published the whole law as to land and dealing with it, especially by way of mortgage, has been drastically overhauled and remodelled by legislation. There are the Land Registration Act, 1925; the Land Charges Act, 1925; the Law of Property Act, 1925; the Law of Property (Amendment) Act, 1926; and the Agricultural Credits Act, 1928.

Because he thought it likely that some of the matters covered by the Property Statutes could not yet be regarded as having reached finality, the author discarded the whole

subject of land as security for advances.

It may, however, be noted that throughout all stages of this legislation it was recognised that it would not do to fetter the facilities for obtaining advances or overdrafts on mortgages of land, either by deed or deposit of title deeds, usually afforded by bankers. The mortgage by deposit is specially safeguarded by the Law of Property Act, 1925, s. 2 (3) (a), which, among 'Equitable Interests Protected', specifies (i) "Any equitable interest protected by a deposit of documents relating to the legal estate affected". Indeed, in certain respects, the Act gives the banker a freer hand in obliging his client with temporary loans or overdrafts.

The most convenient method of affording such accommodation has always been by further advances as needed within the limits of the security; the trouble has been the possible creation of a second mortgage, of which the banker had notice, to which further advances would be postponed, even if the banker had bound himself to make them, on the rules laid down in *Hopkinson v. Rolt* (b); *West v. Williams* (c). The second mortgagee was not bound to give notice to the first, and his claim could only be defeated if it were shown that he had wilfully abstained from getting the deeds or finding out where they were, and cases occurred where his explanation on this point was held sufficient, while there was always the question what did or did not amount to notice.

So the Act deals with the matter, obviously with the banker in mind. It says, s. 94 (1) (d) :

"After the commencement of this Act, a prior mortgagee shall have a right to make further advances to rank in priority to subsequent mortgages (whether legal or equitable);

"(a) if an arrangement has been made to that effect with the subsequent mortgagees."

This is simple enough, but the second mortgagee might not agree.

"(b) if he had no notice of such subsequent mortgages at the time when the further advance was made by him."

On the face of it, this simply continues the previous position, as above stated, viz., that the mortgagee could make further advances until he got notice of the subsequent mortgage. But, under the new legislation, registration of a mortgage is notice to all the world, and the banker might therefore have found his further advances left unprotected by virtue of the registration, unknown to him, of a second mortgage. He

(a) 15 Halsbury's Statutes 182.

(b) (1861), 9 H.L. Cas. 514; 35 Digest 437, 1776.

(c) [1899] 1 Ch. 132; 35 Digest 438, 1786.

(d) 15 Halsbury's Statutes 273.

could not send round to search every time a cheque was presented against an agreed overdraft. So sub-s. (2) enacted :

“In relation to the making of further advances after the commencement of this Act a mortgagee shall not be deemed to have had notice of a mortgage merely by reason that it was registered as a land charge or in a local deeds registry, if it was not so registered at the date of the original advance or when the last search (if any) by or on behalf of the mortgagee was made, whichever last happened.”

At the instance of the British Bankers' Association, among the minor amendments made in the 1925 Act by the Law of Property (Amendment) Act, 1926, s. 7, is the following :

“S. 94. In sub-section 2, for the words ‘date of the original advance’ there shall be substituted the words ‘time when the original mortgage was created’,”

and the sub-section must, of course, be read as so amended.

Where accommodation is taken by way of overdraft on a current account it might well happen that some time elapsed between the signing of the mortgage or charge and the overdraft which constitutes the first or original advance. The amendment obviates the danger of a second mortgage being registered in that interval.

Inasmuch as the mere deposit of title deeds constitutes an equitable mortgage (e), it is presumed that in such case the ‘mortgage is created’ by the fact of such deposit.

Sub-section (2) continues :

“This sub-section only applies where the prior mortgage was made expressly for securing a current account or other further advances,”

and it might be contended that ‘expressly’ involved writing, though it does not necessarily do so. At any rate, if, as would almost always be the case, there is a more or less formal instrument of mortgage or charge, it should specify that it is to secure further advances on current account or otherwise.

The curious thing is that while the sub-section speaks of ‘the last search (if any)’, no duty of periodical or subsequent search is imposed on the prior mortgagee. The bank searches, finds nothing, gets the mortgage executed at once, and then can go on advancing unless and until it receives actual notice of a second mortgage. It has been suggested that it is better not to make any subsequent search.

It would almost seem as if the benefit of sub-s. (2) was meant to be confined to bankers. ‘Current account’ is universally understood to mean an account at a bank drawn on by cheque, and ‘other further advances’ is *ejusdem generis* with ‘current account’. The wording is different from that of sub-s. (1), which only speaks of ‘further advances’. Possibly, however, this is too narrow a construction.

(e) *Foster v. Barnard*, [1916] 2 A.C., at p. 160.

Of course, if the bank does search and find a second mortgage registered, or if it gets actual notice of such mortgage, the old law applies, subject to the exception hereafter mentioned, and it makes further advances at its peril, and must adopt the necessary precautions to prevent payments in being attributed to the second debt, as in *Deeley v. Lloyds Bank, Ltd.* (ee). If the bank's charge is registered under the Land Registration Act, 1925, presumably the registrar would send notice to the bank of any proposed entry of a second mortgage or charge under s. 30 of that Act (f). Or he might take the view that although the charge was 'for securing further advances' the proposed entry would not 'prejudicially affect the priority of any further advances thereunder' unless and until the bank came to search and found it. If such notice were sent and received it would be actual notice of a second charge and preclude further advances, which seems inconsistent with the provisions of s. 94 of the Law of Property Act, 1925 (g). Prior mortgagees may, of course, prefer to stand on their rights as to further advances without registration.

Section 94 (1) (c) gives the mortgagor priority for further advances :

"whether or not he had such notice as aforesaid, where the mortgage imposes an obligation on him to make such further advances."

The 'notice as aforesaid' is a reference to s. 94 (1) (b), *ante*, p. 364.

The obligation on the mortgagee to make such further advances must be imposed on him by the mortgage. But the protection applies 'whether or not the prior mortgage was made expressly for securing further advances' (s. 94 (1)). It is not easy to see how the obligation can be imposed by a mortgage which is not made expressly for securing further advances. It may mean that the mortgage need not be exclusively for further advances, it might be for a lump sum down with a covenant to make further advances, the sort of mortgage which would presumably not fall within sub-s. (2). The use of the word 'obligation' is open to criticism: 'where the mortgage imposes an obligation on him to make *such* further advances'—advances, that is, although he has had notice of the second mortgage. There can be no such obligation save in the inconceivable case of a mortgagee covenanting to make further advances although the mortgagor should create subsequent mortgages which would leave those further advances uncovered. In *West v. Williams* (h), there was a definite covenant to make further advances to an amount not reached. LINDLEY, L.J., said :

"... if the mortgagor chooses to borrow money from some one else

(ee) [1912] A.C. 736 ; 12 Digest 488, 3996.

(f) 15 Halsbury's Statutes 455.

(g) 15 Halsbury's Statutes 273.

(h) [1899] 1 Ch. 132 ; 35 Digest 438, 1786.

and to give him a second mortgage, the mortgagor thereby releases the first mortgagee from his obligation to make further advances."

CHITTY, L.J., said :

"... the covenant to make further advances creates no difficulty, and for this reason : the covenant is to make the further advance on the security of the property, and inasmuch as the mortgagor has by his own act deprived himself of the power to give the stipulated security, no action for damages would lie on the covenant. It is hardly necessary to add that no action lies for specific performance of any agreement to make a loan."

This case was cited with approval in *Deeley v. Lloyds Bank, Ltd.* The obligation under such a mortgage is really a qualified one to make fresh advances so long as the security remains intact in its original condition.

If 'obligation' in sub-s. (1) (c) is read in this sense, it may be that, as the sub-section only gives the right to make further advances after notice of the second mortgage, the first mortgagor has an equal right to refuse them ; but it is difficult to see why, if he does choose to make them, he should have priority, or why any second mortgagee should take a security liable to be so defeated. Cheshire, in his *Modern Real Property*, 5th (1944) ed., p. 649, thinks that *West v. Williams* is reversed. He says that "when the provision in the prior mortgage is that the mortgagee shall be bound to make further advances if called upon to do so, the new rule is that the doctrine of tacking shall apply to such advances notwithstanding the fact that at the time of making them the prior mortgagee has had notice of a later mortgage".

There may be cases of absolute obligation, but it is difficult to visualise them. In *Bradford Banking Co., Ltd. v. Briggs & Co., Ltd. (j)*, LORD BLACKBURN speaks in this relation of "a mortgagee who is entitled, but not bound, to give credit on the security of property belonging to the debtor", but he is merely emphasising the voluntary nature of the subsequent advances. The case has been suggested of a bank agreeing to advance to a builder £2000, £1000 now and a further £1000 when the building has reached a certain state, on the security of the land plus the building. But if, before the second £1000 is advanced, the mortgagor gives a second mortgage, he diminishes the security : it is not the agreed security of the land plus the house, and under the doctrine of *West v. Williams* the prior mortgagee would be released from his conditional obligation to advance the further £1000.

SECTION 1.—STOCKS AND SHARES

The Companies Act, 1929, was passed on 10th May, 1929. It repealed the Companies Consolidation Act of 1908 and also

the Companies Act, 1928, which was more or less a temporary measure. It is a consolidating and amending Act. There is not much in it directly affecting bankers. It reproduces (*k*) s. 77 of the Companies Act, 1908, regulating the method of execution of bills and cheques by companies, the section involved in most of the derogated and imputed authority cases.

The recent Law of Property Acts only deal with land, so that where in this section the term 'mortgage' is employed, it must not be understood as if it were a dealing with land.

Stocks and shares, not being chattels or negotiable instruments, are more fitly treated as the subject of mortgage than as that of pledge (*l*). The deposit of certificates constitutes an equitable mortgage, which the Court will enforce by order for transfer and foreclosure (*m*). The equitable mortgagee by deposit of certificates may also obtain an injunction against transfer by the mortgagor in fraud of his rights (*n*). The Court has power to decree transfer and sale in lieu of transfer and foreclosure. Possession of the certificates alone might enable a sale to be made, but, in the absence of transfer, the mortgagee would have no power of carrying out the sale, even if power of sale were given by a memorandum of deposit. A contract to transfer is no doubt implied in the deposit of the certificates, and if the mortgagor voluntarily transfers, there would be no need to resort to the Court. Even the trustee of a bankrupt mortgagor by deposit of certificates would be ordered to transfer, the jurisdiction not being taken away by the bankruptcy, and rule 75 of the Bankruptcy Rules, 1915 (*o*) being confined to mortgages of real or leasehold property. But, both for facility of realisation and securing priority, immediate legal transfer of stock or shares is desirable. A man may be a registered shareholder or stockholder, may hold the certificates, and so be in a position to deal with or transfer the shares or stock, but by reason of his holding a fiduciary position, such as that of trustee, or by reason of prior equitable charges on the security, there may be persons entitled to an equitable interest therein which does not appear. To oust such equitable rights, a person subsequently taking the shares or stock by way of sale or mortgage must not only do so honestly and for value and without any notice of the prior equitable rights, but he must complete his title by acquiring the legal estate. What constitutes the completion of the legal title must partly depend on the constitution and regulations of the particular company

(*k*) Companies Act, 1929, s. 30 ; 2 Halsbury's Statutes 791.

(*l*) Cf. *Harrold v. Plenty*, [1901] 2 Ch. 314 ; 35 Digest 255, 142 ; *Deverges v. Sandeman, Clark & Co.*, [1902] 1 Ch. 579 ; 35 Digest 497, 2272 ; *Stubbs v. Slater*, [1910] 1 Ch. 632 ; 35 Digest 497, 2274.

(*m*) *Harrold v. Plenty*, *supra*.

(*n*) *Société Générale de Paris v. Tramways Union Co.* (1884), 14 Q.B.D. 424, *per* LINDLEY, L.J., at p. 453.

(*o*) 1 Halsbury's Statutes 730.

or undertaking. If the transfer of shares or stock can only be made by deed, as in the case where the Companies Clauses Consolidation Act, 1845, applies, or as may be required by the articles of association, the delivery of a blank transfer is not sufficient to pass the legal estate. As LINDLEY, L.J., says in *Powell v. London and Provincial Bank* (p) :

“ We all know that both at common law and under these statutes, if you execute a transfer in blank, that instrument with the blanks is not a deed.”

The person to whom it is delivered is not authorised or able to make it a complete deed by filling up the blanks. It may be redelivered by the transferor after being so filled up, and so become effectual as from the date of redelivery. An agent cannot effect such redelivery unless himself authorised by deed (q).

Where, however, the transfer is not necessarily by deed, a blank transfer authorises the transferee to fill up all necessary blanks, and thereupon operates as a good transfer without delivery (r).

Where a blank transfer is taken in respect of any but fully-paid shares quoted on the London Stock Exchange (it is a condition on which an official quotation is granted that no lien shall be claimed by the company on such shares), it is usual to give notice of lien to the registrar or secretary, the intention being to prevent his company's claiming the paramount or overriding lien, which it customarily gives itself in its articles of association, in respect of advances which it may make to the shareholder subsequent to the execution of the bank's charge. This notice is sometimes repudiated on the ground that by s. 101 of the Companies Act, 1929 (s), no notice of a trust may be entered on the register. This is a confusion of ideas. Such notice is not a notice of trust, and in view of *Mackereth v. Wigan Coal and Iron Co., Ltd.* (t) and *Bradford Banking Co., Ltd. v. Briggs & Co., Ltd.* (u), it is difficult to see any authority for the refusal to accept a notice of lien.

Registration

In practically all companies, however, the regulations prescribe more than the mere transfer for the completion of a legal title. Registration is a usual requisite, and in such case the transferee must get himself registered, or at any rate must acquire a present, absolute, and unconditional right to be

(p) [1893] 2 Ch. 555, at p. 560 ; 17 Digest 200, 104.

(q) *Powell v. London and Provincial Bank*, *supra* ; *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20 ; 17 Digest 207, 181.

(r) *Ireland v. Hart*, [1902] 1 Ch. 522, at p. 527 ; 9 Digest 383, 2425 ; cf. *Fuller v. Glyn, Mills, Curle & Co.*, [1914] 2 K.B. 168 ; 9 Digest 367, 2335.

(s) 2 Halsbury's Statutes 838.

(t) [1916] 2 Ch. 293 ; 9 Digest 345, 2183.

(u) (1886), 12 App. Cas. 29 ; 9 Digest 86, 343.

registered as a shareholder before he is affected with notice of the prior equitable title (w). The circumstances constituting this unconditional right have never been defined, and its efficacy, save in very special and equally undefined instances, has been doubted (y).

But it is clear that neither legal transfer nor registration will avail to defeat prior equities unless the procedure throughout is untainted by notice, actual or constructive, or by conduct savouring of sharp practice (z).

Registration is ineffectual to perfect a transfer which is in itself inoperative and of no effect (a).

Forged transfers

And where the invalidity of such transfer arises from its being a forgery, registration thereon at the instance of the banker subjects him to serious peril. By sending in a transfer to himself for registration, the banker probably warrants that the transfer is genuine; he certainly undertakes to indemnify the company against any loss or liability they may incur by acting on it as genuine, should it prove to be a forgery. Should it so prove, the banker would have no claim to the stock or shares, the name of the original holder would have to be restored to the register, and the banker would be liable for any dividends received.

It may well happen that the banker has transferred the stocks or shares, ostensibly conveyed to him, to innocent third parties, such as nominees of the borrower, on repayment of the loan, and that such persons have been registered and had certificates issued to them by the company. In such case the company would be estopped from disputing the title of such transferees. The company would still, however, have to restore the original holders to the register, and the banker would, on the implied indemnity, be liable for the full amount of the stock or shares, at the market price, if they had to be purchased in the market, together with all back dividends. Inasmuch as the right of action on the indemnity only arises when the company has to restore the original owners to the register, the bank might be held liable any number of years after the original transaction had been apparently closed (b). It makes no differ-

(w) *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20, at pp. 29-41; 9 Digest 364, 2325; *Moore v. North Western Bank*, [1891] 2 Ch. 599; 9 Digest 384, 2429; *Ireland v. Hart*, [1902] 1 Ch. 522, at p. 529; 9 Digest 383, 2425; cf. *Fuller v. Glyn, Mills, Currie & Co.*, *supra*.

(y) See *Ireland v. Hart*, *supra*.

(z) Cf. *London and County Banking Co. v. Nixon*, [1901] 2 Ch. 231; 20 Digest 306, 395; *Re Old Bushmills Distillery Co.*, [1896] 1 I.R. 328; *Grierson v. National Provincial Bank of England, Ltd.*, [1913] 2 Ch. 18; 35 Digest 477, 2112.

(a) *Powell v. London and Provincial Bank*, [1893] 2 Ch., at p. 566; 17 Digest 200, 104.

(b) *Sheffield Corporation v. Barclay*, [1905] A.C. 392; 3 Digest 276, 862; cf. *Starkey v. Bank of England*, [1903] A.C. 114; 26 Digest 228, 1784.

ence that certificates have been issued to the bank on registration (c). That had been done in *Sheffield Corporation v. Barclay*. The banker cannot claim an estoppel based on his own misrepresentation (d), or the point is immaterial in view of indemnity.

The Forged Transfers Acts, 1891, 1892, presumably meet this danger in the case of securities of companies and corporations having adopted those Acts. It could hardly be contended that there was no 'loss arising' to the ostensible transferee because the forged transfer gave him no rights to dispose of or lose, on the analogy of *Att.-Gen. v. Odell*, *ubi supra*. The loss arises from his getting nothing for his money, not, as had to be proved in that case, from the ratification of the register, and the whole scheme and wording of the Acts preclude any such suggestion.

POLICIES OF LIFE ASSURANCE

Theoretically a banker has an insurable interest in the life of a person who is indebted to him, and could take out a policy thereon. It is more usual, however, for the debtor to utilise as security a policy which he has taken out himself. The mere deposit of the policy constitutes an equitable mortgage and gives the banker the rights of an equitable mortgagee (e).

Where a policy has been deposited, even without a memorandum, and the depositor becomes bankrupt, the trustee in bankruptcy cannot claim the policy without satisfying the claim of the banker (f). But to constitute complete security, the policy should be assigned by deed and notice given to the company. In default of notice, payment by the company would be good as against the assignee (g). The assignment should provide for payment of premiums by the insured and for the surrender of the policy at surrender value in case of need.

Policies of life assurance provide nowadays for payment not only on natural or accidental death but on death by suicide while sane or insane, if the suicide does not take place before a given period. Since *Moore v. Woolsey* (h), it has been clear that any *bona fide* interest acquired as security for money was safe, so far, at any rate, as suicide while insane was concerned. In *Beresford v. Royal Insurance Co., Ltd.* (j), the suicide was found by the jury to be sane at the time he took his life, and the Court of Appeal disagreed with the view of SWIFT, J., in the Court below, that the paramount duty of the Court was

(c) Cf. *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716.

(d) Cf. *Att.-Gen. v. Odell*, [1906] 2 Ch. 47; 35 Digest 269, 268.

(e) *Spencer v. Clarke* (1878), 9 Ch. D. 137; 29 Digest 376, 3013.

(f) *Re Wallis, Ex parte Jenks*, [1902] 1 K.B. 719; 29 Digest 443, 3421.

(g) Policies of Assurance Act, 1867, s. 3; 9 Halsbury's Statutes 849.

(h) (1854), 4 E. & B. 243; 29 Digest 368, 2959.

(j) [1938] A.C. 586; [1938] 2 All E.R. 602; Digest Supp.

to uphold the sanctity of contract. They held that it was the first duty of the Court to refuse assistance in enabling a person to benefit from his own crime. Referring to assignees for value, LORD ATKIN said :

"Anxiety is naturally aroused by the thought that this principle may be invoked so as to destroy the security given to lenders and others by policies of life insurance, which are in daily use for that purpose. The question does not directly arise, and I do not think that anything said in this case can be authoritative. I consider myself free, however, to say that I cannot see that there is any objection to an assignee for value before the suicide enforcing a policy which contains an express promise to pay upon sane suicide—at any rate, so far as the payment is to extend to the actual interest of the assignee. It is plain that a lender may himself insure the life of the borrower against sane suicide, and the assignee of the policy is in a similar position, so far as public policy is concerned. I have little doubt that after this decision the life companies will frame a clause which is unobjectionable, and they will have the support of the decision of the Court of Queen's Bench in *Moore v. Woolsey*, where a clause protecting *bona fide* interests was upheld. It was suggested to us that, so far as the doctrine was applied to contracts, it would have the effect of making the whole contract illegal. I think that the simple answer is that this is a contract to pay on an event which may happen from many causes, one only of which involves a crime by the assured. The cause is severable, and the contract, apart from the criminal cause, is perfectly valid."

Since this decision, some companies have adopted a suicide clause in their life policies providing, on the life assured's suicide while insane during a given limited period from the date of the policy, or at any time while sane, or death at the hands of justice, for payment to a grantee or *bona fide* holder for value of the sum assured plus bonus additions. Except that when such grantee or holder shall hold by way of security, the company will pay the surrender value or the amount of the *bona fide* interest acquired for pecuniary consideration by way of security and not otherwise secured, whichever is the greater, to an amount not exceeding the sum assured plus bonus additions.

SECTION 2.—THE BANKER'S LIEN

Apart from any special security, the banker can look to his general lien as a protection against loss on loan or overdraft. The general lien of bankers is part of the law merchant and judicially recognised as such (*k*). As stated in *Brandao v. Barnett* (p. 806) :

"Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with lien."

(*k*) *Brandao v. Barnett* (1846), 12 Cl. & Fin. 787 ; 3 Digest 285, 878.

See also *per* BUCKLEY, J., in *Re London and Globe Finance Corporation (l)*.

Securities subject to lien

What class of securities may be the subject of lien is not very clearly defined. The words used in *Brandao v. Barnett* are 'all securities'. In *Davis v. Bowsher (m)*, LORD KENYON, C.J., uses first the words 'all the securities', but afterwards says :

"... wherever a banker has advanced money to another, he has a lien on all the paper securities which come into his hands for the amount of his general balance."

GROSE, J., uses the term 'paper securities'.

The class of securities covered by these definitions cannot, on the one hand, be limited to fully negotiable securities. In *Re United Service Co., Johnstone's Claim (n)*, share certificates ; in *Misa v. Currie (o)*, an order to pay money to a particular person ; in *Jeffryes v. Agra and Masterman's Bank (p)*, a species of deposit receipt, were all held subject to the banker's lien, though none of them was negotiable. On the other hand, the general lien cannot be said to extend to all classes of documents, even though they might otherwise be utilised as security. In *Wylde v. Radford (q)*, KINDERSLEY, V.-C., expressed the view that a conveyance of land was not subject to the general lien. He said, at p. 53 :

"The cases refer to a deposit of documents which are in their nature securities, but there is some ambiguity in the term 'securities'. Anything may of course be deposited, and deeds or plate, after they have been deposited, may be said to be a security ; but what is intended is such securities as promissory notes, bills of exchange, exchequer bills, coupons, bonds of foreign governments, etc., and the Courts have held that if such securities are deposited by a customer with his banker, and there is nothing to show the intention of such deposit one way or the other, the banker has, by custom, a lien thereon for the balance due from the customer."

See, however, *Re Bowes, Strathmore (Earl) v. Vane (r)*, where it would seem to have been assumed that the lien would attach to a policy of insurance.

In *Re London and Globe Finance Corporation (s)*, BUCKLEY, J., cited *Re Bowes, Strathmore (Earl) v. Vane (t)* and *Jones v. Peppercorne (u)*, and said they had been regarded as well settling

(l) [1902] 2 Ch. 416 ; 32 Digest 241, 265.

(m) (1794), 5 Term Rep. 488 ; 3 Digest 289, 899.

(n) (1870), 6 Ch. App. 212 ; 3 Digest 291, 910.

(o) (1876), 1 App. Cas. 554 ; 3 Digest 291, 906.

(p) (1866), L.R. 2 Eq. 674 ; 3 Digest 294, 923.

(q) (1863), 33 L.J. Ch. 51 ; 3 Digest 285, 880.

(r) (1886), 33 Ch. D. 586 ; 32 Digest 229, 138.

(s) [1902] 2 Ch. 416, at p. 420 ; 32 Digest 241, 265.

(t) (1886), 33 Ch. D. 586 ; 3 Digest 289, 895.

(u) (1858), John. 430 ; 32 Digest 241, 264.

the law ever since, that bankers and brokers have a general lien on securities in their hands as between themselves and the customer for the balance due from the customer to the banker.

The nature of the 'securities' subject to the lien is further deducible from the condition that they must come to the banker's hands in his capacity as banker, in the course of banking business. Very possibly it is part of a banker's business to advance money and any class of property may by proper means be made the subject of security. But, save in the case of specific deposit as security, or by way of equitable mortgage, in which cases lien becomes immaterial, it is difficult to conceive how such things as leases or conveyances should come to the banker's hands in the course of his business as such. The better view would seem to be that the lien only attaches to such securities as a banker ordinarily deals with for his customer, otherwise than for safe custody, when there is no question or contemplation of indebtedness on the part of the customer.

Whether a particular security is in the banker's possession for the purpose of being dealt with by him in his capacity as banker is a question of fact, depending partly on the general usage of bankers, and partly on agreement or course of dealing between the banker and the particular customer who owns the security.

Collection and safe custody

It has been suggested that the classification is collection on the one hand, safe custody on the other. This is too sweeping, though collection is no doubt the primary idea of the banker's functions with regard to securities subject to the lien. The possession of anything essential to collection, though not itself to be collected, would clearly be covered by the collection to which it was essential. A bond which had to be produced whenever interest was paid would be subject to the lien if the bankers were instructed to collect the interest. Bonds being deposited with the banker in order that he might cut off and collect the coupons, the lien would probably attach to the bonds as well as the coupons; but not if the customer himself cut off the coupons as they became due; and, as to these latter, only if they were then handed to the banker for collection. If bonds redeemable at a fixed time or by drawings were deposited with the banker to be presented for payment at the due date, or in the event of their being drawn, the lien would attach. The case of debenture or stock certificates deposited with a bank which is to receive the interest for the customer seems doubtful. The possession of them would not seem to be essential or instrumental to the receipt of the interest, and would seem more consistent with mere safe custody until they

should be required on a transfer. In *Re United Service Co., Johnstone's Claim* (w), JAMES, L.J., appears to have considered that certificates deposited in such circumstances would be subject to the lien. Sir M. Chalmers expresses doubt, but inclines to the view above expressed, as being the natural inference from the transaction (y).

Lien on money

Money paid in to the banker's has been expressly stated by the House of Lords to be subject to the banker's lien (z).

It is somewhat difficult to see how in ordinary cases money could be the subject of lien ; it would be usually incapable of identification ; or if ear-marked, would be either deposited for safe custody or as specific security, conditions equally excluding the idea of lien. And the application of the principle of lien to money paid in to the bank is complicated by the consideration that such money, when paid in, constitutes a mere debt of equivalent amount from the banker to the customer ; and a debt is not a suitable subject for a lien. It seems a more logical view to attribute the banker's unquestionable right, to retain a credit balance against a debt due from the customer, to the doctrine and rule of law which authorises the setting off of one debt against another. In *Roxburghe v. Cox* (a), the Court of Appeal, while recognising that the banker's lien applied to money paid into the account, preferred to base their decision on this doctrine of set-off. If the lien applies to money, it would apply to money received for a cheque paid in for collection. In such case the money is unquestionably received by the banker in the course of his business as such. But here again the doctrine of set-off would as efficiently meet the banker's needs.

It must now be taken that the general lien extends only to the customer's own securities. The customer may be able to utilise negotiable securities, not in fact his own, by way of pledge. He may even be able to deposit other securities effectively because they have been left in his hands by the real owner ; but the ground of the banker's claim is, in the first case, negotiability and value given, in the other, holding-out ; in neither is it legitimate lien, save in so far as that term expresses the right of a holder who has taken a bill as security, not as absolute transferee (b).

“ The bankers cannot claim a general bankers' lien except upon the customers' own property.”

(w) (1870), 6 Ch. App. 212 ; 3 Digest 291, 970.

(y) See *Questions on Banking Practice*, 8th ed., question 1111.

(z) *Misa v. Currie* (1876), 1 App. Cas. 554 ; 3 Digest 291, 906.

(a) (1881), 17 Ch. D. 520 ; 3 Digest 286, 883.

(b) Cf. Bills of Exchange Act, s. 27 (3) ; 2 Halsbury's Statutes 47.

Thus COZENS-HARDY, M.R., in *Cuthbert v. Robarts, Lubbock & Co.* (c).

When ROMER, L.J., in *Great Western Railway Co. v. London and County Banking Co., Ltd.* (d), speaks of the general lien affecting all negotiable securities, he is using the word 'lien' in its looser meaning as signifying title as pledgee of a negotiable instrument, though even that was inapplicable in that particular case, the cheques being crossed 'not negotiable' and taken from a person having no title.

What excludes lien

As between the banker and his own customer, the lien may be excluded by express contract or by circumstances which show an implied contract inconsistent with lien. Goods merely deposited for safe custody would clearly be exempt from lien, but they could be utilised as security by the customer's giving a written memorandum of charge evidencing the banker's change of position with regard to them. As to bonds deposited for collection of coupons, see *ante*, p. 374. Money paid in to meet specific bills accepted payable at the banker's, or for any other specific purpose, and so accepted, would be immune. Securities for sale, or money wherewith to effect a purchase, would be exempt (e). So would securities deposited to cover a loan to purchase other securities, although the loan had been drawn against (f). Money paid in by a third person under mistake of fact cannot be retained by virtue of lien (g). There is no lien on the private account of a partner for an overdraft of his firm. There is no lien for the amount of a current discounted bill, except where the customer is bankrupt; see *ante*, p. 184.

Return of securities

When there is agreement or distinct understanding that securities are to be returned on fulfilment of defined conditions, no very distinct rule can be laid down as to what constitutes inconsistency with lien. The question has generally arisen when securities have been deposited to cover specific advances, on repayment of which there has still been a balance due to the banker.

Apart from any special agreement, it was doubted in *Jones v. Peppercorne* (h) whether the banker might not in such case assert his general lien. In *Wilkinson v. London and County Banking Co.* (j), it was assumed throughout that a customer

(c) [1909] 2 Ch. 226, at p. 233; 32 Digest 227, 112.

(d) [1900] 2 Q.B. 464.

(e) *Symons v. Mulkern* (1882), 46 L.T. 763; 3 Digest 289, 898.

(f) Cf. *Cuthbert v. Robarts, Lubbock & Co.*, *ubi supra*.

(g) *Kerrison v. Glyn, Mills, Currie & Co.* (1911); 81 L.J.K.B. 465; 3 Digest 170, 282; see *ante*, 'Money paid by mistake'.

(h) (1858), *John*, 430; 32 Digest 241, 264.

(j) (1884), 1 T.L.R. 63; 3 Digest 289, 894.

depositing securities as cover for specific advances was entitled to have them back on repayment of those advances, independent of the state of account between him and the banker. In *Re London and Globe Finance Corporation (k)*, BUCKLEY, J., held that securities deposited as cover for specific advances, but after discharge thereof left in the banker's hands, became liable to the general lien.

In *Re Bowes, Strathmore (Earl) v. Vane (l)*, a policy of life assurance was deposited with a bank with a memorandum stating it to be deposited as security for all moneys then or thereafter due on balance of current account or otherwise, not exceeding in the whole at any one time the sum of £4000. The customer died indebted to the bank in more than £4000. NORTH, J., held that the special agreement was inconsistent with a general lien for the balance of £1000. This case and *Jones v. Pepper-corne* were, in *Re London and Globe Finance Corporation, supra*, treated as establishing the law.

The judgment of BUCKLEY, J., was thus based on the ground that the securities, being consciously left in the banker's hands after satisfaction of the specific advances, might be regarded as having come into his hands anew in the way of business or as impliedly repledged or redeposited; and the better view seems to be that, even where not so expressed, securities deposited for specific advances can be claimed by the customer on discharge of those specific advances, although he may still owe money to the banker. It would further seem that where securities are jointly deposited to cover a joint liability, one of the depositors, on paying his share of the liability, is entitled to the return of a proportionate return of the securities (*m*). This point is, however, usually covered by the memorandum or deed charging the securities.

Distinction as to proceeds

But the same rule does not apply to the proceeds of such securities when sold (*n*).

Collection not inconsistent with lien

In *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank (o)*, BIGHAM, J., uses words which might be taken to imply that collection is a special purpose inconsistent with lien. This is of course not the case. Collection is essentially in the way of a banker's business, and his lien over documents in his hands for that purpose has been repeatedly recognised (*p*).

(k) [1902] 2 Ch. 416; 32 Digest 241, 265.

(l) (1886), 33 Ch. D. 586; 3 Digest 289, 895.

(m) *Coats v. Union Bank of Scotland*, [1928] S.C. 711.

(n) See *post*, 'Realisation of Securities'.

(o) [1904] 2 K.B. 465; 3 Digest 291, 908.

(p) Cf. *Misa v. Currie* (1876), 1 App. Cas., at pp. 565, 569, 573; 3 Digest 291, 906.

Judgment of LORDS BIRKENHEAD, L.C., BUCKMASTER and CARSON in *Sutters v. Briggs* (g) :

"... if bankers are not holders of cheques for which they are agents for collection only, they derive no benefit from s. 27, sub-s. 3, as the sub-section does not apply even where there is a lien to a person who is not a holder."

It has even been held that, in the absence of special notice, a clearing banker has a lien over bills remitted for collection by his correspondent in respect of a balance due from such correspondent, though the bills were the property of the latter's customer (r).

Lien and pledge

Lien being the right to retain another man's property until a debt is paid, property and lien cannot co-exist in the same person with regard to the same article. The lien peculiar to a banker, with regard to negotiable securities, is defined in *Brandao v. Barnett* (s), as 'an implied pledge'; but, assuming this to be the case, absolute property is as inconsistent with the rights of a pledgee as it is with those of a person having a lien.

Merger

If, therefore, the banker becomes holder in his own right of negotiable securities coming into his possession as banker, his right of lien or pledge is gone, or rather is merged in the higher rights of an independent holder for value.

Whether he holds under a lien or as holder for value in his own right, forged indorsement, or, in the case of a cheque, the 'not negotiable' crossing, has precisely the same effect on his rights against parties to the instrument.

Duty to present bills

Where bills, notes, or cheques are in the banker's hands subject to the lien, it is his duty to present them at maturity and give notice of dishonour if they are not paid. This obligation may be based either on his position as agent or as holder for value.

No right to negotiate

The *dicta* in *Thompson v. Giles* (t), as to the banker's right to negotiate bills held for collection or as security, where the state of the customer's account renders it reasonable to do so, are too vague to be acted upon. The same remark applies to *Re Harrison, Ex parte Barkworth* (u).

(g) [1922] 1 A.C., at p. 18; 25 Digest 418, 213.

(r) *Johnson v. Robarts* (1875), 10 Ch. App. 505; 3 Digest 248, 724; *Re Dilworth, Ex parte Armitstead* (1828), 2 Gl. & J. 371; 26 Digest 227, 1780.

(s) (1846), 3 C.B., at p. 531; 32 Digest 227, 111.

(t) (1824), 2 B. & C. 422, at pp. 429, 432; 3 Digest 210, 508.

(u) (1858), 2 De G. & J. 194; 3 Digest 211, 513.

Accounts must be in the same right

Either by right of lien or set-off, a banker appears entitled to retain a credit balance on a purely private account against overdraft on any other account for which the customer is personally liable, though by reason of being earmarked or even fiduciary, the latter account is itself exempt from lien or combination. Reasonable notice must, of course, first be given, and cheques previously drawn must be honoured.

Set-off

It appears to be thought in banking circles today that where a banker has more than one account, in the same right, of the same customer, no right of set-off exists between the two accounts without notice, presumably on the ground that the customer, by the fact of having two accounts, has impliedly instructed the banker to keep them separate and thus taken away any basis for set-off. The only support for this view seems to be a *dictum* of SWIFT, J., in *Greenhalgh (W. P.) & Sons v. Union Bank of Manchester (w)*, to the effect that a banker has no right, "without the assent of the customer . . . to move either assets or liabilities from the one account to the other. The very basis of his agreement with the customer is that the accounts shall be kept separate." The Institute of Bankers has certainly fostered this view, for, in commenting on the *Greenhalgh Case*, in its Journal for 1924, at p. 283, it said :

"This right of set-off has, however, long been recognised as being subject to limitations which in many circumstances deprive it of much of its value to the banker. Once something has occurred to stop the account, as, for example, the death of the customer, or the commission of an available act of bankruptcy by him, the bank's right of set-off comes into operation without restriction, but so long as the accounts are active the banker cannot set off the debit balance of one account against the credit balance of the other except after reasonable notice given to the customer, unless either (a) there is a definite agreement giving the banker the right ; or (b) such a right can be inferred from the course of business between the bank and its customer.

"From the ordinary course of business it would be a matter of great difficulty to establish such a right. It would, therefore, usually be unwise to rely on any right of set-off except subject to reasonable notice, and it is very obvious that the necessity of giving notice would deprive the right of most of its value."

Again, from p. 359 of the Journal of the Institute, it appears that surprise had been expressed at what was said previously and that it had been pointed out that the *Greenhalgh* judgment was apparently irreconcilable with the judgment in *Garnett v. McKewan (y)*. As to this the Institute remarked :

"In the *Garnett Case* the customer had a credit balance at one branch of the bank upon which he drew cheques. The bank, having

(w) [1924] 2 K.B. 153 ; Digest Supp.

(y) (1872), L.R. 8 Exch. 10 ; 3 Digest 222, 574.

ascertained that the customer had an overdraft at another branch of the bank, set off the two accounts without notice to the customer and dishonoured his cheques, and the Court upheld the bank's right to act in this way.

"MR. JUSTICE SWIFT pointed out that where a bank agrees with a customer to open two separate accounts in the latter's name, 'the very basis of his agreement with the customer is that the accounts shall be kept separate', and it must now be taken for granted that a banker in such circumstances tacitly abandons his right to combine the accounts without notice. It would be unwise to rely on the judgment in the *Garrett v. McKewan* case, which is over fifty years old; the tendency of more recent judgments has been to protect the customer against such action by the bank (z), and the Court would almost certainly read into the circumstances where possible an agreement to keep the accounts separate."

SWIFT, J.'s words, taken by themselves, are definite, but it is submitted that they must be read as part of a judgment in a case in which the proceeds of certain bills were alleged to have been wrongfully appropriated by the bank. SWIFT, J., found that although there had been an intention to appropriate them, this did not take place, but as the bank knew of the intention to appropriate to a particular account they could not take advantage of the failure actually to do so. The very nature of the case renders it practically useless as a guide to the general question of the right of a banker to set off one account against another.

SECTION 3.—PLEDGE

It is not unusual to find, classed under the head of lien, cases where securities are definitely deposited as cover for a running account or for specific advances. The recognition of the banker's lien may no doubt be adduced as showing that it is part of a banker's business to lend money, and, in that sense, it might be said that the securities come into his possession in the course of his business. But the true conception of lien seems to be rather of its attaching to documents which come to the banker's hands by a process not directly connected with any overdraft or advance.

Pledge

Where the security is professedly handed over for the purpose of securing an overdraft or an advance, the transaction is strictly of the nature of a pledge.

Pledge of bills

With regard to bills, notes, or cheques, the distinction is

(z) See *Buckingham & Co. v. London and Midland Bank, Ltd.* (1895), 12 T.L.R. 70; "Legal Decisions Affecting Bankers", vol. 1, p. 219; 3 Digest 218, 554.

immaterial. Probably the lien arising from contract mentioned in s. 27, sub-s. 3 (a), was intended to refer to pledge. In any case the pledgee has the same rights. If he takes in good faith, he acquires an independent title and right to sue on the instrument to the extent of what is due to him, and to hold the instrument against the true owner until his claim is satisfied; except, of course, in the case of forged indorsement or 'not negotiable' crossing. Such title does not, however, justify him in negotiating the instrument, at any rate unless the state of the customer's account renders this a reasonable thing to do. Negotiation in some circumstances is recognised in *Thompson v. Giles* (b) and *Re Harrison, Ex parte Barkworth* (c); but, apart from agreement, it is difficult to define such a state of affairs; and negotiation would be an absolute departure from the usual practice, namely, to present the instrument at maturity and give notice of dishonour if it is not paid.

Pledge and transfer

The dividing line between the pledge of a bill or note and its absolute transfer, equivalent to discount, is sometimes difficult to draw. The presumption in all cases of negotiation is in favour of absolute transfer, and this presumption is heightened when the transfer is by indorsement. The question is, however, one of fact, and the presumption is rebuttable. It may be shown, as laid down in *Re Firth, Ex parte Schofield* (d), that the indorsement was not by way of transfer, but merely by way of affording the additional security of the pledgor's name in a transaction which was really one of pledge only.

As to the complications which may arise where a 'stiffening' indorsement is taken from a person not a party to the bill, see the bewildering series of cases starting with *Steele v. M'Kinlay* in 1880 (e), down to *Macdonald (Gerald) & Co. v. Nash & Co.*, in the H. of L. (f).

Bill as collateral security no suspension of remedy

A bill or note deposited as security or pledged to cover an advance or overdraft does not, as does a bill or note or cheque given for a debt, suspend the remedy for the debt. The two coexist, run side by side, are in the true sense collateral. There is nothing in law to prevent a banker suing for an overdraft even during the currency of a note or bill at a fixed date which he has taken as security (g).

(a) Bills of Exchange Act, 1882; 2 Halsbury's Statutes 47.

(b) (1824), 2 B. & C. 422, at pp. 429, 432; 3 Digest 210, 508.

(c) (1858), 2 De G. & J. 194; 3 Digest 211, 513.

(d) (1879), 12 Ch. D. 337; 6 Digest 135, 893.

(e) (1880), 5 App. Cas. 754; 6 Digest 11, 23.

(f) [1924] A.C. 625; Digest Supp.

(g) *Peacock v. Pussell* (1863), 14 C.B.N.S. 728; 6 Digest 135, 894.

Satisfaction of debt not payment of bill

And satisfaction of the debt is not necessarily payment of the bill or note. To discharge a bill there must be payment in due course, which must be by or on behalf of the drawee or acceptor. Payment in due course involves payment to the holder (*h*). Application of moneys by the holder himself, however legitimate, does not constitute payment in due course. In *Jenkins v. Tongue* (*j*), the secretary of an institution had given a promissory note to secure an advance; part of the advance was stopped, with his consent, out of his salary. Held that this would not support a plea of payment *pro tanto* of the promissory note. In *Glasscock v. Balls* (*k*), a promissory note was given to secure an advance, and property was mortgaged as further security. The mortgage was realised, and the mortgagee paid himself the advance out of the proceeds. The Court of Appeal were of opinion that this did not constitute payment of the promissory note.

Whether payment direct by the borrower, but definitely made on account of the debt, not the security, would stand on the same footing, might be doubtful; but, assuming the basis to be the collateral, concurrent nature of the debt and the security, there would seem to be no valid distinction.

In *Glasscock v. Balls*, LORD ESHER expressed himself as not being clear what were the rights of the person giving the bill or note in such a case. He suggested that he might be entitled to a perpetual injunction restraining the holder from negotiating or parting with the instrument.

It is difficult to see why, on satisfaction of the debt, however made, the giver of the note or bill is not entitled to claim the instrument, like a redeemed pledge. It is only LORD ESHER's silence as to this obvious course that suggests a doubt. If the note or bill is, after satisfaction of the debt, left in the holder's hands, a *bona fide* holder for value, taking it before it is overdue, can acquire a good title (*l*), and the satisfaction of the debt would be no defence against him when suing on the instrument.

Promissory notes as cover

A common form of security as cover is a promissory note payable on demand, that being a continuing security. But if such note be indorsed, it must be presented within a reasonable time after indorsement to charge the indorser (*m*). In estimating such reasonable time, the character of the instrument as a continuing security must be taken into account; but that would not justify its being held over for any period during which the loan might be outstanding. SIR MACKENZIE

(*h*) Bills of Exchange Act, 1882, s. 59; 2 Halsbury's Statutes 66.

(*j*) (1860), 29 L.J. Ex. 147; 32 Digest 557, 11.

(*k*) (1889), 24 Q.B.D. 13; 6 Digest 343, 2279.

(*l*) *Glasscock v. Balls*, *supra*.

(*m*) Bills of Exchange Act, 1882, s. 86 (1); 2 Halsbury's Statutes 77.

CHALMERS suggests ten months as the limit, basing his view on *Chartered Mercantile Bank of India, London and China v. Dickson* (n), and this is probably the maximum.

Fully negotiable securities as cover

Fully negotiable securities, other than bills or notes, may be utilised as cover by deposit with or without an accompanying memorandum. The lender becomes at once pledgee; if he takes the instrument *bona fide* and for value, he acquires a title against all the world to hold it until the obligation it was given to cover is discharged (o). The test of good faith is the same as is applied in the case of the transferee of a bill. An antecedent debt forborne by express or implied agreement on deposit of the security is sufficient consideration (p).

Fully negotiable instruments of this class, such as bonds payable to bearer, recognised as negotiable by the stock exchange and the mercantile community, are the best security a banker can get. No question of forged indorsement can arise; and by their nature they give no scope for the danger attaching to bills that they may have been obtained by such fraud as excludes the contracting mind. A negotiable security of this class may be stolen from its true owner, and yet the pledgee, if he take it *bona fide* and for value, can hold it against him, as if it had been a bank note.

Absolute negotiability is a fixed quantity, admitting of no qualifications or degrees.

Taking securities from agent as cover

For a short period a pernicious theory obtained that some sort of constructive notice affected the banker if he took instruments, however fully negotiable, by way of pledge, from an agent such as a stockbroker.

That, however, was finally dispelled by the case of *London Joint Stock Bank v. Simmons*; see also *Fuller v. Glyn, Mills, Currie & Co.* (q); *Lloyds Bank, Ltd. v. Swiss Bankverein* (r). The previous decision of the House of Lords in *Sheffield (Earl) v. London Joint Stock Bank, Ltd.* (s), was the foundation of the pre-existing error above referred to. This decision was not unreasonably understood as laying down that if negotiable securities were tendered as cover by a person who, from the nature of his business, was likely to have securities of other persons in his hands, it was the duty of the bank to inquire into the nature and extent of his authority to deal with the securities; that

(n) (1871), L.R. 3 P.C. 574; 6 Digest 231, 1455.

(o) *London Joint Stock Bank v. Simmons*, [1892] A.C. 201; 6 Digest 448, 2873; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120; 6 Digest 447, 2870.

(p) *Glegg v. Bromley*, [1912] 3 K.B. 474; 12 Digest 212, 1702.

(q) [1914] 2 K.B. 168; 3 Digest 271, 846.

(r) (1913), 108 L.T. 143; 6 Digest 132, 878.

(s) (1888), 13 App. Cas. 333; 1 Digest 345, 565.

the omission to make such inquiry might preclude the banker from the position of holder in good faith and for value ; and further that, though the agent might have authority to pledge the securities of each principal separately, this would not avail the bank if the securities of various principals were pledged *en bloc* to secure one advance.

London Joint Stock Bank v. Simmons

In *London Joint Stock Bank v. Simmons* (1), the House of Lords declared that *Sheffield (Earl) v. London Joint Stock Bank, Ltd.* was decided purely on the particular facts of the case, which in their opinion were such as to affect the bank with either actual or legal notice of the limited right of property of the person with whom they were dealing, and of the fact that, in pledging the securities as he did, he was exceeding such right of property or any authority reposed in him. They repudiated the idea that any new principle of law was laid down by that case, and emphatically affirmed the right of a bank or any other person to take as security negotiable instruments, even from a person known to be an agent, without the necessity of inquiring into his authority so to deal with them, provided always there were no extrinsic circumstances reasonably calculated to arouse suspicion. The guiding principle for bankers in dealing with brokers or other agents who, from the nature of their businesses, are likely to have in their hands securities belonging to their clients, must therefore be derived from *London Joint Stock Bank v. Simmons* irrespective of any supposed general propositions which may have appeared deducible from *Sheffield's (Earl) Case*. LORD HALSBURY, in *London Joint Stock Bank v. Simmons*, expressly says that there is nothing in the position of broker and customer which makes it a reasonable inference that the broker is exceeding his authority, or raises a doubt on the subject ; that the inferences arrived at in *Sheffield's (Earl) Case* have no relation to the course of business which brokers habitually pursue towards their own clients, and for their own clients, when dealing with bankers with whom they deposit securities ; and he proceeds, at p. 211 :

“ The deposit of securities as ‘ cover ’ in a broker’s business is as well known a course of dealing as anything can possibly be, and the phrase that they are deposited *en bloc* seems to me to be somewhat fallacious. That they are, in fact, deposited by the broker at one time, and to raise one sum, may be true. It does not follow, and I do not know, that the banker could reasonably be expected to presume that they belonged to different customers, and that the limit of the broker’s authority was applied to each individual security by his own client.”

He then says that in *Sheffield's (Earl) Case* no countenance was given to the notion that, because the pledgor was assumed to

be the agent for the owners of the property, that circumstance alone put the bank upon inquiry as to his title to the property with which he dealt, and adds :

“To lay down as a broad proposition that in every case you must inquire whether a known agent has the authority of his principal would undoubtedly be a startling proposition, and certainly nothing said in *Sheffield's (Earl) Case* could justify so novel an idea. The broad proposition laid down by CHIEF JUSTICE ABBOTT in 3 B. & C. 47, that whoever is the holder of a negotiable instrument ‘has power to give title to any person honestly acquiring it’, seems to me to be decisive of this case.”

LORD HERSCHELL dwelt strongly on the absurdity which would result if negotiable securities could not be as readily taken by way of pledge from an agent as documents of title to goods are by virtue of the Factors Act. He said it was admitted that a good title to negotiable instruments could be acquired by purchase from an agent entrusted with them, and could see no reason why the case of pledge should stand on any different footing. He says, at p. 217 :

“What ground is there for the position that in regard to a pledge the case is different ; that one may safely take a negotiable instrument by way of sale from an agent without enquiry, but cannot so take it by way of pledge ? It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title or the extent of his authority.”

And at the conclusion of his judgment LORD HERSCHELL sums up the whole matter in words which concede all that any banker could reasonably ask. At p. 223 he says :

“But I desire to rest my judgment upon the broad and simple ground that I find, as a matter of fact, that the bank took the bonds in good faith and for value. It is easy enough to make an elaborate presentation, after the event, of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think, however, they were not bound to occupy their minds with any such speculation. I apprehend that when a person whose honesty there is no reason to doubt offers negotiable securities to a banker or any other person, the only consideration likely to engage his attention is whether the security is sufficient to justify the advance required. And I do not think the law lays upon him the obligation of making any inquiry into the title of the person whom he finds in possession of them ; of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction, the case would be different. The existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed, and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting.”

It would be superfluous to comment on the position so clearly and satisfactorily stated, except to say that the main

principle involved is in no sense restricted to the case of an agent, but applies just as much to that of a person who professes to deal with the securities as an independent owner (u).

It is to be regretted that in some recent judgments, not of the same authority, there has been a tendency to import a test of being put on inquiry, apart from good faith and more akin to negligence; though, in *Eckstein v. Midland Bank, Ltd.* (w), GREER, J., drew attention, with some emphasis, to the observations of LORD HERSCHELL and LORD MACNAGHTEN in *London Joint Stock Bank v. Simmons*.

There have also been efforts to set up a doctrine of constructive notice or implied trust with regard to negotiable instruments, but these were summarily and finally disposed of by the Court of Appeal in *Lloyds Bank, Ltd. v. Swiss Bankverein* (y).

Documents must be negotiable

But it must be borne in mind that all the rights and immunities accorded to the banker in the *Simmons Case* were founded and dependent on the proved or assumed full negotiability of the instruments pledged to him. It is necessary, therefore, to consider what are the tests of negotiability.

A. NEGOTIABLE INSTRUMENTS

To be negotiable, an instrument must fulfil the following conditions: It must embody a promise or ground of action in itself (z). In the case of foreign government bonds there is a promise but no enforceable ground of action (a). It must purport to be, in its then condition, transferable by delivery; it must, either by statute or by the custom of the mercantile community of this country, be recognised as so transferable and as conferring, upon a person who takes it honestly and for value, independent and indefeasible property in, and right of action on, it (b). BLACKBURN, J., says a negotiable instrument must be 'transferable, *like cash*, by delivery', but, of course, he does not mean it must always pass at its face value. Few securities would fulfil that test. He is speaking merely of the method of transfer. The admission made in the *Simmons Case* was that the bonds in question passed from hand to hand on the stock exchange; and BOWEN, L.J., points out

(u) Cf. *Jones v. Peppercorne* (1858), John. 430; 1 Digest 549, 2002.

(w) (1926) (unreported).

(y) (1913), 108 L.T. 143; 3 Digest 276, 861.

(z) *Jones & Co. v. Coventry*, [1909] 2 K.B. 1029; 6 Digest 455, 2903.

(a) *Goodwin v. Roberts* (1875), L.R. 10 Exch. 337; 17 Digest 7, 31.

(b) Cf. *per* BLACKBURN, J., in *Crouch v. Credit Foncier of England* (1873), L.R. 8 Q.B., at p. 381; 6 Digest 444, 2854; *per* LORD HERSCHELL, in *London Joint Stock Bank v. Simmons*, [1892] A.C., at p. 215; 6 Digest 448, 2873; and especially the lucid statement of the true rule by BOWEN, L.J., in *Simmons v. London Joint Stock Bank*, [1891] 1 Ch., at p. 294.

the difference between transferability and true negotiability, and that the admission was consistent with the bonds being transferable, but not legally negotiable. The House of Lords, coupling this admission with a somewhat general statement made in evidence that the bonds so passed as 'negotiable securities', held their legal negotiability proved. LORD MACNAGHTEN, indeed, seemed desirous of minimising, or even obliterating, the difference between transferability and negotiability, by deprecating the setting up of 'refined distinctions habitually ignored on the stock exchange' (c).

The inevitable and desirable extension of the category of negotiable instruments is probably better forwarded by the growing custom of merchants, exercised on a proper and intelligent basis, than by any such summary levelling of carefully defined and logical boundaries.

How negotiability established

It is sometimes said that the custom of the stock exchange is the only criterion of the negotiability of an instrument. No doubt the concentration in the stock exchange of dealings in all classes of securities renders that body a factor of ever-increasing importance in the determination of the question, and evidence from the stock exchange is the most available and carries the greatest weight in the courts; but there is no justification, certainly none in any of the earlier cases, for confining the recognition of negotiability to the stock exchange, to the exclusion of bankers, merchants, and other classes of the mercantile world.

Recent recognition sufficient

The recent origin of a mercantile custom to treat a particular class of instrument as negotiable is no bar to its validity. This is disputed by those who advocate the view that the negotiability of certain instruments was recognised by, and incorporated in, the ancient law merchant, and that, save by statute, no addition can therefore be made to the category.

The judgment of KENNEDY, J., in *Bechuanaland Exploration Co. v. London Trading Bank, Ltd.* (d), in which the earlier and somewhat conflicting decisions are carefully reviewed, is very convincing in the opposite direction; and it was followed by BIGHAM, J., in *Edelstein v. Schuler & Co.* (e). Apart from authority, it hardly appears conducive to national prosperity that an important part of the circulating medium of the country should be once and for all limited to that which sufficed for the comparatively small commerce of earlier days, with no

(c) *London Joint Stock Bank v. Simmons*, [1892] A.C. 201, at p. 224; 6 Digest 448, 2873.

(d) [1898] 2 Q.B. 658; 6 Digest 444, 2855.

(e) [1902] 2 K.B. 144; 6 Digest 450, 2880.

possibility of expansion to meet the larger needs of modern times.

Must be negotiable here

The negotiability of a foreign instrument in the country of its origin is no evidence that it is negotiable here. As BOWEN, L.J., said in *Picker v. London and County Banking Co.* (f):

"Then is evidence that an instrument or piece of money forms part of the mercantile currency of another country any evidence that it forms part of the mercantile currency in this country? Such a proposition is obviously absurd; for, if it were true, there could be no such thing as a national currency. For the same reason, as it appears to me, that a German dollar is not the same thing as its equivalent in English money for this purpose, and that the barbarous tokens of some savage tribe, such as cowries, are not part of the English currency, evidence that the instrument would pass in Prussia as a negotiable instrument does not show that it is a negotiable instrument here." (g)

The instruments in *Picker's Case* were Prussian bonds issued with detached coupons. The evidence was that they were treated in Prussia as negotiable by delivery apart from the coupons, but it was not proved that they were so treated in the English market. The question has since arisen whether the absence of, say, one coupon not yet due, from an otherwise negotiable instrument, affects its negotiability. MATHEW, J., in *Rothschild & Sons v. Inland Revenue Commissioners* (h), held coupons negotiable *per se*. He did not distinguish between those due and those accruing. It is conceivable that a man might wish to realise future coupons without parting with the capital. The independent negotiability of the coupons would seem to imply that of the bond without them. Rule 139 of the London Stock Exchange reads: "Securities shall not be a good delivery without the Coupon before they are made ex Coupon"; but the rules are clearly for the convenience of the Stock Exchange and nothing more should be read into them.

B. SO-CALLED QUASI-NEGOTIABLE SECURITIES

Outside the region of really negotiable securities one comes across the dubious doctrine of securities which are said to be, or to have become, negotiable by estoppel, or quasi-negotiable. Either term is misleading, the latter particularly so. The true view is that expressed by JUDGE WILLIS (j):

"Title by estoppel is what men mean when they speak of negotiability by estoppel, but title by estoppel is a different thing altogether from negotiability. . . ."

(f) (1887), 18 Q.B.D. 515; 6 Digest 444, 2857.

(g) Cf. *Williams v. Colonial Bank* (1888), 38 Ch. D. 388, at p. 404.

(h) [1894] 2 Q.B. 142; 6 Digest 493, 5125.

(j) *Law of Negotiable Securities*, 5th ed., p. 13.

‘Negotiable by estoppel’

The phrase ‘negotiable by estoppel’ is used by BOWEN, L.J., in *Easton v. London Joint Stock Bank* (k); but he is most careful to explain that it is a mere convenient figure of speech, and that the real underlying principle is that of personal estoppel by conduct, representation, or holding out an agent as having certain authority, of which the instrument is an element or evidence; not the attribution of partial or fictitious negotiability to the instrument itself.

There is no case of this nature which is not either actually explained on this basis or is not so explainable.

Goodwin v. Robarts

In *Goodwin v. Robarts* (l), LORD CAIRNS puts the position thus :

“The plaintiff bought in the market scrip which, from the form in which it is prepared, virtually represented that the paper would pass from hand to hand, and that anyone who became *bona fide* the holder might claim for his own benefit the fulfilment of its terms from the foreign government. The appellant might have kept this scrip in his own possession, and, if he had done so, no question like the present would have arisen. He preferred, however, to place it in the possession and under the control of his broker or agent, and, although it is stated that it remained in the agent’s hands for disposal or to be exchanged for the bonds when issued, as the appellant should direct, those into whose hands the scrip would come could know nothing of the title of the appellant, or of any private instructions he might have given to his agent. The scrip itself would be a representation to anyone taking it, a representation which the appellant must be taken to have made or to have been a party to, that, if the scrip were taken in good faith and for value, the person taking it would stand to all intents and purposes in the place of the previous holder. Let it be assumed, for the moment, that the instrument was not negotiable, that no right of action was transferred by the delivery, and that no legal claim could be made by the taker in his own name against the foreign government; still the appellant is in the position of a person who has made a representation, on the face of his scrip, that it would pass with a good title to anyone on his taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made. My lords, I am of opinion that, on doctrines well established, the appellant cannot be allowed to defeat the title which the respondents have thus acquired.”

Varied in form and expression, that is really the substance of all the cases which have given rise to the theory of quasi-negotiability or negotiability by estoppel.

Bowen, L.J., on title by estoppel

BOWEN, L.J., in *Easton v. London Joint Stock Bank*, *ubi supra*, though for convenience, as before stated, he uses the

(k) (1886), 34 Ch. D. 95, at pp. 113-114; 6 Digest 447, 2868.

(l) (1876), 1 App. Cas. 476, at p. 489; 6 Digest 451, 2884.

ambiguous term, clearly shows that the ground of his decision is the principle enunciated by LORD CAIRNS. He says (p. 113) :

"... if these bonds are not strictly negotiable and do not possess the incidents of negotiable instruments which are recognised as such, nevertheless a further question arises : whether Lord Sheffield, by the way he has treated these bonds, has not estopped himself from denying their negotiability, whether he has not—by placing for disposal, and with the intention that they should be transferred, in the hands of an agent of his own, bonds which on their very face purport to create a liability quite independent of anterior equities between the company and the person who takes them—really chosen to treat these bonds as negotiable and to authorise his agent to treat them as such. If the negotiability of these bonds by estoppel, so to speak, arises, that disposes of all difficulty that would arise owing to the seal being attached to these bonds ; because it is no longer a question whether they are, strictly speaking, negotiable, but whether Lord Sheffield has chosen to treat them as such. This second way of looking at the matter may be dealt with from two points of view, but practically they run into one another. You may say that Lord Sheffield, having placed in the hands of his agents these bonds with the intention that they should be transferred beyond these agents and held his agents out to the world as clothed with authority to transfer them as negotiable, cannot afterwards, by any unknown dealing, or any limitation of authority which he has conferred on his agents, prejudice those who took the bonds which have so been floated. Or you may say, which I think is a sound way of putting it, that as regards Lord Sheffield and the bank these bonds have become negotiable by estoppel, and therefore Lord Sheffield is precluded from saying the legal title to these bonds is not in the bank."

The same principle is briefly expressed by LORD HERSHELL in *Colonial Bank v. Cady and Williams* (m) :

"If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value."

Conditions of estoppel by conduct

This same case of *Colonial Bank v. Cady and Williams* indicates certain constituents which must be present to render the representation effective or justify a person in acting on it so as to acquire title by estoppel. The instrument must be complete ; there must be no further formality required on the face of it to entitle the taker to full rights and title. If, for instance, it is a blank transfer, it must, on the face of it, purport to pass *ipso facto*, in its then condition, and without the necessity of any further step, all rights and title to a person taking it *bona fide* and for value (n). The possession of the agent must, taken in connection with the nature and condition of the instrument, be consistent only with intention on the part of the principal that the agent shall have power to transfer it by way of sale

(m) (1890), 15 App. Cas. 267, at p. 285 ; 6 Digest 453, 2891.

(n) Cf. *Fuller v. Glyn, Mills, Currie & Co.*, [1914] 2 K.B. 168 ; 6 Digest 453, 2892.

or pledge. Possession is not, as in the case of fully negotiable instruments, indicative of right to dispose of the instrument. If the agent's possession is ambiguous, is equally compatible with authority to transfer and another purpose, the taker has no right to assume the former. As LORD HALSBURY points out in *Colonial Bank v. Cady and Williams* (o), mere custody, apart from what the instrument, upon the face of it, represents to any person to whom it might be exhibited, is not a representation of authority to transfer. That only comes in when the document itself, in the condition in which it was entrusted to the agent, represents, by its being in that condition, that the agent is entitled to deal with it in the way he proposes to do. The real test is whether the principal has represented the agent as invested with disposing power (p). It is liability by holding out, either holding out the instrument or the agent or both.

A somewhat analogous case is that of a person who entrusts another with title-deeds for the purpose of raising money on them for the principal's benefit. In such case the owner is estopped from disputing the title of any person who honestly lends money on the security, notwithstanding the agent utilised the deeds to borrow money on his own account and exceeded the limit imposed by the principal (q). The same principle is clearly enunciated with regard to an incomplete cheque in *London Joint Stock Bank, Ltd. v. Macmillan and Arthur* (r).

Estoppel by character of document

Estoppel of this character may arise from representation of the character of the document conveyed by its terms, apart from any question of agency. If a company, for instance, choose to issue instruments, such as debentures, in a form whereby they bind themselves to pay the amount to bearer, they may be estopped by such representation from asserting any equities of their own affecting a previous holder, as against a person who has taken the instrument *bona fide* and for value on the faith of such representation (s).

Theoretically the pledgee may part with the possession of the securities to a third party or even to the pledgor himself for a temporary specific purpose not involving or facilitating the creation of any conflicting right or interest, which purpose fulfilled, the securities are to be immediately returned to the

(o) (1890), 15 App. Cas. 267, at p. 273.

(p) *Per* LORD HALSBURY, in *Farguharson Brothers & Co. v. King & Co.*, [1902] A.C., at p. 330; 21 Digest 289, 1021.

(q) *Brocklesby v. Temperance Building Society*, [1895] A.C. 173; 1 Digest 317, 379; *Rimmer v. Webster*, [1902] 2 Ch. 163; 1 Digest 376, 823; *Lloyds Bank, Ltd. v. Cooke*, [1907] 1 K.B. 794; 1 Digest 315, 370; *Smith v. Prosser*, [1907] 2 K.B. 735; 1 Digest 315, 371.

(r) [1918] A.C. 777; 3 Digest 233, 644.

(s) *See Re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge* (1870), L.R. 11 Eq. 478; 6 Digest 38, 267.

pledgee, and so doing would not divest him of his rights (*i*). It has even been held that he may re-pledge the securities so long as he does so only to the extent of his own interest and does not purport to pledge or charge the whole property (*u*). But in any case parting with possession of the securities may well mean loss of them. The same conditions and characteristics which render them good in the banker's hands render them good in anybody else's hands as against the banker. If they are negotiable, anyone who takes them *bona fide* and for value can keep them; if not strictly negotiable, he can set up holding out.

Lloyds Bank, Ltd. v. Swiss Bankverein (*w*) is an illustration and a warning. The bank lent money on bearer bonds to bill brokers. The bank called in the loan. The brokers came and paid the loan by cheque and received back the bonds. The cheque was dishonoured. The bank sued the defendants, who had received the bonds from the brokers honestly. The Court of Appeal held that the question whether value had been given was immaterial. Notice, if any, was constructive. The alleged ground of action was that the bonds were impressed with a trust in favour of the plaintiffs. The Court of Appeal held that it was repugnant to the nature of negotiable instruments to seek to impress them with vendor's lien, implied trust or constructive notice, and that the plaintiffs' claim failed. FARWELL, L.J., said, "the bankers give up their securities and take the broker's cheque, and the risk is theirs on the broker's cheque". A case similar in principle is *Lloyds Bank, Ltd. v. Bank of America National Trust and Savings Association* (*y*), for which see *post*, p. 398, under 'Documents of Title to Goods'.

A curious question arose in *Crerar v. Bank of Scotland* in the Court of Session (*z*). A Miss Crerar deposited with the bank 2,775 ordinary shares of J. & P. Coats, Ltd., as security for advances, and these, following the usual custom, were transferred into the names of the bank's nominees. After some fifteen years, the advances were repaid and Miss Crerar claimed that she was entitled to have retransferred to her name the identical shares which she had originally deposited. Throughout the whole course of dealing the bank always held, registered in the company's register in the names of the bank's nominees, shares sufficient to enable them at any moment to retransfer shares equivalent to those pledged by any or all of their customers, and when retransfers were made any shares were inserted in the transfer and it would be very unlikely, except by

(*i*) Cf. *North Western Bank, Ltd. v. Poynter, Son and Macdonalds*, [1895] A.C. 56; 37 Digest 7, 30.

(*u*) *Halliday v. Holgate* (1868), L.R. 3 Exch. 299; 37 Digest 3, 4.

(*w*) (1913), 108 L.T. 143; 6 Digest 132, 878.

(*y*) [1938] 2 K.B. 147; [1938] 2 All E.R. 63; Digest Supp.

(*z*) [1922] S.C. (H.L.) 137; "Journal of Institute of Bankers", vol. xliii, p. 50; Digest Supp.

accident, that any customer would receive back the shares originally deposited, as no regard was paid to the individual numbers of anyone's particular shares.

The Court of Session upheld Miss Crerar's contention that the bank was bound to identify and return the specific shares deposited by customers ; but gave judgment for the bank on the ground that in this particular case the plaintiff had acquiesced in the course adopted by the bank. Probably this is right in theory : on payment a pledgor has a right to the return of the thing pledged, whether the pledgee be a banker or a pawnbroker, and the shares in this case were identifiable by number. Still the application of the principle to shares is unreasonable. One block of the same class and denomination of shares is absolutely as good as another. Specific return in *detinue*, instead of damages, is not ordered unless the article is of unique or very special value, such as the Puzey horn or the Greek altar, the classic examples. Whether in *detinue*, *conversion* or *breach of contract*, Miss Crerar's injury and measure of damages could only be the value of equivalent shares at the market price of the day of repayment.

SECTION 4.—DOCUMENTS OF TITLE TO GOODS

Provided the banker is dealing with honest and responsible persons, documents of title to goods, such as bills of lading, delivery orders, warehousemen's certificates, dock-warrants and letters of lien or hypothecation, are convenient securities for advances. By means of them goods can be effectively pledged which obviously could not otherwise be so utilised, by reason of their bulk or location. By bills of lading in especial, goods on the high seas can be hypothecated before arrival and thus used as cover for bills given for the price or for advances. Naturally, a very large proportion of this business is transacted through brokers and other agents of the owners of the goods, and the Factors Act, 1889, and the Sale of Goods Act, 1893, are praiseworthy efforts to minimise the banker's risk in dealing with such agents, and incidentally with quasi-owners, such as vendors who have already sold the goods elsewhere and vendees who may not be in a position to pass a good title to a subvendee or pledgee.

It is not the scheme of these Acts to elevate the various documents of title to the position of the banker's ideal security, the fully negotiable instrument, to which he acquires an indefeasible title, whatever the customer's position, whether the customer be honest or dishonest, whether the security be the customer's own or he has authority to deal with it or not, and whether the banker takes it for an existing debt or a fresh advance. They really amount to little more than an *extension and possible extension of the principle of holding-out* by entrusting documents of title to an agent or person in a

fiduciary position. And, unfortunately, the provisions of the two Acts are so tangled, so overlapping, so complicated by cross-references and the idea of reducing everything to the common denominator of 'the mercantile agent', that, for want of certainty, the safeguards are not so complete or reassuring as they were doubtless intended to be.

As above implied, neither of these Acts professes to apply or does apply where the person dealing with the goods is the actual owner (a), but see *Lloyds Bank, Ltd. v. Bank of America National Trust and Savings Association* (b), *post*, p. 398.

The 'person who has sold the goods', classed as a mercantile agent by the Factors Act, 1889, s. 8 (c), and Sale of Goods Act, 1893, s. 25 (1) (d), is obviously a person who has sold the goods previously, but is enabled to deal wrongfully with them by reason of the vendee having allowed him to remain in possession of the documents of title. The 'person who has bought or agreed to buy the goods' (e) is the person who has got the goods or the documents under an incomplete or revocable sale or contract of sale.

Pledge by real owner

Where the real owner and possessor is the person seeking an advance on the security of the goods, the pledge is not complete unless and until there has been actual or constructive delivery of the goods.

Actual delivery to a banker is out of the question. As to constructive delivery, it is incongruous to find that in many of the cases the ideal method of effecting such delivery is stated to be the handing over the key of the warehouse where the goods are stored, analogous to livery of seisin. BOWEN, L.J., used the simile of such key even with regard to a bill of lading. The delivery of the key being an impracticable proposition in business matters, other methods had to be devised. Unreasonable as it may seem, the difficulty, where efforts have been made to effect direct constructive delivery from owner to pledgee, has been to avoid the operation of the Bills of Sale Acts; and, further, to get clear of the 'order and disposition' clauses of the Bankruptcy Act. This precludes the otherwise obvious method of a delivery warrant, like a warehouseman's, being issued direct by the owner. In *Dublin City Distillery, Ltd. v. Doherty* (f), the owners delivered documents of this nature to the pledgees. The House of Lords held that this was not actual or constructive delivery of the goods, and was within the Bills of Sale Act.

(a) Cf. *Ingilis v. Robertson and Baxter*, [1898] A.C. 616; 1 Digest 334, 489.

(b) [1938] 2 K.B. 147; [1938] 2 All E.R. 63; Digest Supp.

(c) 1 Halsbury's Statutes 40.

(d) 17 Halsbury's Statutes 626.

(e) Factors Act, s. 9; Sale of Goods Act, s. 25 (2).

(f) [1914] A.C. 823; 37 Digest 6, 17.

LORD ATKINSON said (g) :

"... delivery of a warrant such as those delivered to the respondent in the present case is in the ordinary case, according to Parke, B, no more than an acknowledgment by the warehouseman that the goods are deliverable to the person named therein or to anyone he may appoint. The warehouseman holds the goods as the agent of the owner until he has attorned in some way to this person and agreed to hold the goods for him; then and not till then does the warehouseman become a bailee for the latter, and then and not till then is there a constructive delivery of the goods. The delivery and receipt of the warrant does not *per se* amount to a delivery and receipt of the goods."

The theory would seem to be that the same person cannot by one and the same operation transfer or pledge and attorn, and that the delivery orders, warrants, etc., excepted from the Bills of Sale Act, 1878, by s. 4 (h), as being used in the ordinary course of business, only include those which operate through the intervention of a third party in possession of the goods, such as a warehouseman. In such circumstances, both the owner's delivery order and the warehouseman's delivery warrant are, of course, within the exception. But, as pointed out by LORD ATKINSON, the constructive delivery is only effective where both have been obtained. As LORD PARKER said in the same case, at p. 852 :

"When the goods are not in the actual possession of the pledger, but of a third party as bailee for him, possession is usually given by a direction of the pledger to the third party requiring him to deliver them to or hold them on account of the pledgee, followed either by actual delivery to the pledgee or by some acknowledgment on the part of the third party that he holds the goods for the pledgee. The form in which such direction or acknowledgment is given is immaterial. Where the third party is a warehouseman, the direction usually takes the form of a delivery order and the acknowledgment of a warrant for delivery of the goods or an entry in the warehouse books of the name of the pledgee as the person for whom the goods are held."

The position is perhaps more clearly and fully put by LORD WRIGHT, giving the decision of the Privy Council (three of whose members were members of the House of Lords) in *Madras Official Assignee v. Mercantile Bank of India, Ltd.* (hh), at p. 58. The case was decided on the Indian Code (which goes further than the English), and under which it is possible for the owner of goods to obtain a loan on the pledge of the documents of title without giving notice to the custodian and obtaining his attornment, a course which, in English law, is open only to a 'mercantile agent'. LORD WRIGHT described this as "a curious and anomalous position" and suggested that the facts of the case illustrate well the reasonableness of a change in the law. The full text of LORD WRIGHT's summary of the English law of pledge is given at p. 58 and is as follows :

(g) *Ibid.* p. 847.

(h) 2 Halsbury's Statutes 85.

(hh) [1935] A.C. 53 ; Digest Supp.

"At the common law a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive. It involved a bailment. If the pledgor had the actual goods in his physical possession, he could effect the pledge by actual delivery; in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee, the change being perfected by the third party attorning to the pledgee, that is acknowledging that he thereupon held for him; there was thus a change of possession and a constructive delivery: the goods in the hands of the third party became by this process in the possession constructively of the pledgee. But where goods were represented by documents the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodian (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading, the transfer of which by the law merchant operated as a transfer of the possession of, as well as the property in, the goods. This exception has been explained on the ground that the goods being at sea the master could not be notified; the true explanation may be that it was a rule of the law merchant, developed in order to facilitate mercantile transactions, whereas the process of pledging goods on land was regulated by the narrower rule of the common law and the matter remained stereotyped in the form which it had taken before the importance of documents of title in mercantile transactions was realized. So things have remained in the English law; a pledge of documents is not in general to be deemed a pledge of the goods; a pledge of the documents (always excepting a bill of lading) is merely a pledge of the *ipsa corpora* of them; the common law continued to regard them as merely tokens of an authority to receive possession, though from time to time representations were made by special juries that in the ordinary practice of merchants transfers of documents were understood to pass possession, as for instance in 1815, in *Spear v. Travers* (i). The common law rule was stated by the House of Lords in *M'Ewan, Sons & Co. v. Smith* (ii). The position of the English law has been fully explained also more recently in *Inglis v. Robertson and Baxter* (j) and in *Dublin City Distillery, Ltd. v. Doherty* (jj). But there also grew up that legislation which is compendiously described as the Factors Acts, the first in 1823, then an Act in 1825, then an Act in 1842, then an Act in 1877, and finally the Act in 1889 now in force. The purpose of these Acts was to protect bankers who made advances to mercantile agents: that purpose was effected by means of an inroad on the common law rule that no one could give a better title to goods than he himself had. The persons to whom the Acts applied were defined as agents who had in the customary course of their business as such authority to sell goods or to consign goods for sale or raise money on the security of goods; in the case of such persons thus intrusted with possession of the goods or the documents of title to the goods, the possession of the goods or documents of title to the goods was treated in effect as evidence of a right to pledge them, so that parties *bona fide* and without notice of any irregularity advancing money to such mercantile agents on the goods or documents were held entitled to a good pledge, even though such mercantile agents were acting in fraud of the true owner. Section 3 of

(i) (1815), 4 Camp. 251; 39 Digest 523, 1378.

(ii) (1849), 6 Bell, Sc. App. 340; 6 Digest 456, 2909.

(j) [1898] A.C. 616; 1 Digest 334, 489.

(jj) [1914] A.C. 823; 37 Digest 6, 17.

the Factors Act, 1889, provides that 'a pledge of document of title to goods shall be deemed to be a pledge of the goods'. It has been held that this section only applies to transactions within the Factors Act : *Ingis v. Robertson and Baxter*.

Thus the curious and anomalous position was established that a mercantile agent, acting it may be in fraud of the true owner, can do that which the real owner cannot do, that is, obtain a loan on the security of a pledge of the goods by a pledge of the documents, without the further process being necessary of giving notice of the pledge to the warehouseman or other custodian and obtaining the latter's attornment to the change of possession."

This difficulty in the way of the owner's being in a position to pledge goods in his own possession has been circumvented by the institution of letters of lien or letters of hypothecation. At p. 64 of the judgment in *Madras Official Assignee v. Mercantile Bank of India, Ltd. (k)*, LORD WRIGHT says on this :

"The letter of hypothecation was in terms an acknowledgment by the insolvents that they had deposited the property documents and securities thereunder mentioned as collateral security for the advance, with a power of sale in the case of default and various ancillary provisions. This letter, in their Lordships' judgment, constitutes a good equitable charge which is binding between the insolvents and the respondents, and is equally binding on the appellant who, for this purpose, merely stands in the insolvents' shoes, and has as against the respondents no higher or better right than the insolvents had at the date of the insolvency. An analogous case was considered in *Re Slee, Ex parte North Western Bank (kk)*, where a letter of lien over wools of the bankrupt which were in his warehouse, was held to create a good equitable charge in favour of bankers who had made advances ; no delivery of the warrant for wools had been made ; but it was held that the bankers had a good title against the trustee in bankruptcy. This authority was followed and approved in *Re Hamilton, Young & Co., Ex parte Carter (l)*."

And again, at p. 66 :

"A still further point was raised on behalf of the respondent ; it was argued that if under Section 178 [Indian Contract Act, 1872] the respondents did not get a good pledge at law by the delivery of the railway receipts, still that delivery, considered on all the facts of the case, was evidence of a good equitable charge at least as between the immediate parties even ignoring the accompanying letters of hypothecation. That argument found favour with the Appellate Court, and their Lordships think it is well founded. Even if the documents of title are regarded as merely tokens of an authority to receive possession, it seems that their transfer for value by way of security for advances must at least raise an equity as between transferor and transferee entitling the latter to an order restraining the former from himself claiming delivery of the relative goods without producing the receipts ; if so, the appellant (*i.e.*, the bankruptcy assignee) must be subject to the same equity."

The distinction seems a narrow one, but it is clear that an owner, though he cannot himself pledge, may, by agreement,

(k) [1935] A.C. 53 ; Digest Supp.

(kk) (1872), L.R. 15 Eq. 69 ; 1 Digest 335, 494.

(l) [1905] 2 K.B. 772 ; 5 Digest 770, 6614.

change his possession into that of bailee for the pledgee, and that the instrument constituting him such is 'one used in the ordinary course of business as proof of the possession or control of goods' within the exception of the Bills of Sale Act, and takes the goods out of his 'order and disposition'. One might originally have doubted this, but there is the authority of LORD MERSEY that such documents evidence a transaction of the most ordinary kind as between bankers and merchants and that such transactions happen by the score every day in the great commercial centres. The words 'we hold on your account and under lien to you', which usually occur in these documents, may be taken to have the effect of converting the possession of the owner into that of a bailee from the pledgee. Or the letter of lien may be regarded as an equitable agreement to pledge subsequently. Suffice it that the validity and efficacy of such instruments is now acknowledged (II). They are subject, however, to being defeated by any person who, without notice, acquires a legal title to the goods. Departure from usual form would seem dangerous, because it might remove the instrument from the category of those used in the ordinary course of mercantile business, and bring it within some definition requiring registration as a bill of sale. Thus in *R. v. Townshend (m)* a hypothecation note given to bankers, undertaking to hold goods in trust for them and to hand over the proceeds when received, was held to be a bill of sale as 'a declaration of trust without transfer', the goods not being at sea. In *Re David Allester, Ltd., ubi supra*, a good precedent of a trust letter will be found, which was held effective by ASTBURY, J.

The danger of parting with documents of title, even for temporary purposes, has been dealt with before. In the case of documents of title to goods there is the additional risk that the Factors Act or Sale of Goods Act may operate against the banker by vesting a good title in a third party. In *Lloyds Bank, Ltd. v. Bank of America National Trust and Savings Association (mm)*, judgment was given for the respondent bank both in the lower Court and the Court of Appeal. The appellants, Lloyds Bank, Ltd., had lent to Strauss and Co. Ltd. against documents of title to goods and had later released the documents to Strauss under a letter of trust by which Strauss acknowledged receipt of the documents and undertook to hold the goods in trust for the bank and also the proceeds, and to pay the bank when received. Strauss pledged the documents, however, with the respondent bank. The case really turned on whether or not Strauss were mercantile agents within the

(II) *Re Slee, Ex parte North Western Bank* (1872), L.R. 15 Eq. 69; 7 Digest 27, 135; *Re Hamilton, Young & Co., Ex parte Carter*, [1905] 2 K.B. 772; 7 Digest 28, 141; *Re David Allester, Ltd.*, [1922] 2 Ch. 211; 37 Digest 7, 31.

(m) (1884), 15 Cox, C.C. 466; 7 Digest 6, 16.

(mm) [1938] 2 K.B. 147; [1938] 2 All E.R. 63; Digest Supp.

meaning of the Factors Act. Lloyds argued that Strauss were the owners and that they, the bank, had only a special property in the goods, and that Strauss were not mercantile agents. GREENE, M.R., held that the bank and the merchants together constituted the owner, and he dismissed the argument that the letter of trust was merely a permission by the pledgees to the pledgors to exercise their own power of disposition, in the following terms : " the case . . . is a clear one of an authority given to a mercantile agent who is employed in that capacity for that purpose within the meaning of the section ".

The case appears conclusive, but it seems a somewhat free rendering of the statute, in view, too, of *Inglis v. Robertson and Baxter* (n), to regard as mercantile agents merchants who have pledged goods—by way of documents of title—to their bankers as security for advances and who received those goods back for sale under an instrument by which the goods and the proceeds were held in trust for the bank ; and, further, to regard the bank as a principal of itself and Strauss for the purpose of authorising them to deal with the goods. It is significant that the merchants lacked some, at any rate, of the ordinary attributes of an agent ; they received no commission and were liable as principals in an action on the goods ; they were not entitled to any indemnity from the bank.

MACKINNON, L.J., in the course of his judgment, gave a calming answer to the suggestion that the decision might interfere with the practice of taking trust receipts :

" There was some suggestion that, if the decision in this case was to the effect that a person who was in possession of documents released to him pursuant to such a trust receipt would be in the position of a mercantile agent under the Factors Act, it might have a serious effect upon the continued use of that practice in the future. I do not apprehend any such danger or difficulty. The truth is that almost every aspect of commercial dealing is not proof against the possible result of very rare frauds that a lawyer, thinking of the possibilities of such things, might suppose to be so easy. In this case Strauss and Co. Ltd. in breach of good faith, and in breach of their contract, pledged these goods, and thereby improperly obtained money upon the value of them ; but if they had sold the goods and misappropriated the purchase price, they would only have been acting in a rather different way in breach of their duty and in breach of their contract, and in that case the plaintiffs would have had no shadow of a claim against anybody except Strauss and Co. Ltd. I have no doubt that this very convenient practice will be able to continue, and that it will be able to continue because the whole basis of business rests upon honesty and good faith, and it is very rarely that such an expectation is defeated."

For consideration of the effect of the fraudulent pledging of Indian railway receipts, see the judgment of the Privy Council in *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* (nn).

(n) [1898] A.C. 616 ; 1 Digest 334, 489.

(nn) [1938] A.C. 287 ; [1938] 1 All E.R. 52 ; Digest Supp.

BILLS OF LADING

Bills of lading not negotiable

The Factors and Sale of Goods Acts include bills of lading with other documents of title to goods, as if standing on the same footing. But they have always been recognised as holding an exceptional, if not clearly defined, position.

Question of negotiability

Opinions have differed as to whether they have any, and what, intrinsic negotiability of their own. The special verdict on the second trial of *Lickbarrow v. Mason* (o) found that, by the custom of merchants, they were 'negotiable and transferable by the shipper's indorsement', but the interpretation of a legal term used in a verdict must always be somewhat doubtful, and, as BOWEN, L.J., said in *Burdick v. Sewell* (oo) :

"... the words of the special verdict in *Lickbarrow v. Mason* admittedly overstate the law"

The interesting criticisms of LORD BLACKBURN on that case in *Sewell v. Burdick* (p) raise considerable doubt whether the judgment delivered by LORD LOUGHBOROUGH in the Exchequer Chamber was ever reversed on its merits, and that judgment in the plainest terms denied the negotiability of bills of lading.

Though subsequently criticised, the judgment delivered by LORD CAMPBELL in *Gurney v. Behrend* (pp) is by many regarded as setting forth the true view. In it he says :

"A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a *bona fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent *bona fide* transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods ; and in this instance the transfer of the symbol does not operate more than a transfer of what is represented."

The Bills of Lading Act, 1855, gave a right of action on the bill of lading to the 'indorsee to whom the property in the goods shall pass', but it is generally assumed that it did not invest the instrument with any additional degree of negotiability.

The view that probably the only exceptional feature akin to negotiability possessed by bills of lading is their acknowledged capacity to defeat the unpaid vendor's right of stoppage *in transitu*, when transferred with authority to a *bona fide* transferee for value, is confirmed by *Scrutton on Charterparties*,

(o) (1794), 5 Term. Rep. 683 ; 41 Digest 384, 2292.

(oo) (1884), 13 Q.B.D., p. 173.

(p) (1884), 10 App. Cas. 74, at p. 98 ; 41 Digest 372, 2186.

(pp) (1854), 3 E. & B. 622, at p. 633 ; 41 Digest 385, 2297.

14th (1939) ed., p. 220. Sir JAMES SHAW WILLES is reputed to have said that negotiable instruments "include bills of lading as against stoppage *in transitu* only".

If bills of lading were fully negotiable, there would be no need for their being included, as they are, with other documents of title to goods in the Factors Act, 1889, and the Sale of Goods Act, 1893.

For full treatment of these somewhat complicated and perplexing Acts, the reader is referred to the leading treatises on the subject, notably one by Sir Mackenzie Chalmers, who drew them.

Lien and stoppage *in transitu*

There are, however, two sections in these Acts which recognise the special rights attaching to bills of lading. Under s. 47 of the Sale of Goods Act, 1893 (*g*), re-enacting in somewhat fuller terms s. 10 of the Factors Act, 1889 :

"... where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

Pledge of bill of lading

It will be noticed that this section expressly recognises the utilisation of bills of lading and other documents of title by way of pledge as well as absolute transfer, and formulates the rights arising out of such pledge, following the lines laid down in *Sewell v. Burdick* (*r*).

Liability for freight

As shown by that case, the liability for freight, and other liabilities which, under the Bills of Lading Act, 1855, s. 1, attach to

"every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such indorsement",

do not attach to one who takes the bill by indorsement and delivery by way of pledge for a loan ; inasmuch as the absolute property does not pass to him, but only a special property.

Documents as cover for acceptances

Documents of title to goods, particularly bills of lading,

(*g*) 17 Halsbury's Statutes 636.

(*r*) (1884), 10 App. Cas. 74 ; 41 Digest 372, 2186.

may be utilised as security for bills which the banker has agreed to accept and accepted for the customer. The usual method is for the banker to furnish the customer with a letter of credit, authorising him or other beneficiary to draw to a specified amount against shipments or bills of lading, and undertaking to accept bills so drawn, provided the documents accompany the bills. To ensure acceptance, the shipping documents or other documents of title must accompany the bill, or reach the bankers before or at the time when they are called upon to accept. The bills of lading or other documents must strictly comply with the description of them in the letter of credit (s). How far, in the interests of his client, a banker is bound to scrutinise the bill of lading was a question raised but not decided in the Court of Appeal in *National Bank of Egypt v. Hannevig's Bank*. SCRUTTON, L.J., said :

"In some cases the obligation of a banker, under such a credit, may need very careful examination. I only say at present that to assume that for one-sixteenth per cent. of the amount he advances a banker is bound carefully to read through the policies and to exercise a judgment as to whether the legal effect of the bill of lading and the policy is, on the whole, favourable to their clients, is an obligation which I should require to investigate considerably before I accepted it in that unhesitating form."

In view of *Hansson v. Hamel and Horley, Ltd.*, *ubi supra*, per LORD SUMNER, at p. 46 :

"These documents have to be handled by banks ; they have to be taken up or rejected promptly and without any opportunity for prolonged inquiry ; they have to be such as can be re-tendered to sub-purchasers, and it is essential that they should so conform to the accustomed shipping documents as to be reasonably and readily fit to pass current in commerce",

one may safely assume that minute scrutiny of a bill of lading is not an absolute obligation on the banker. It would certainly be one which existing conditions of credit work in banks would render impracticable. Regarding misstatements as to date of shipment in bills of lading, see *Finlay (James) & Co. v. N.V. Kwik Hoo Tong H.M.* (t). The accuracy and truth of the contents of a bill of lading are of equal concern to the banker himself, who may have to rely on his rights as indorsee thereof. The combination of the above-stated terms in a letter of credit, shown to the person who parts with his goods on the faith of it, does not constitute any right in him, or any other holder of the bill, to the goods. As LORD CAIRNS says, in *Banner v. Johnston* (u), at p. 174 :

(s) *Hansson v. Hamel and Horley, Ltd.*, [1922] 2 A.C. 36 ; 41 Digest 375, 2212 ; *Cape Asbestos Co., Ltd. v. Lloyds Bank, Ltd.*, [1921] W.N. 274 ; Digest Supp. ; *Scott (Donald H.) & Co., Ltd. v. Barclays Bank, Ltd.*, [1923] 2 K.B. 1 ; Digest Supp. ; *National Bank of Egypt v. Hannevig's Bank, Ltd.* (1919), 1 Ll. L. Rep. 69 ; "Journal of Institute of Bankers", vol. xl, p. 305.

(t) [1929] 1 K.B. 400 ; Digest Supp.

(u) (1871), L.R. 5 H.L. 157.

"... the two arrangements, which are perfectly separate in their nature, namely, the arrangement or promise to accept the bills, which promise is to be shewn to the parties selling the cotton, to whom the bills are offered, and the order from the bankers to those dealing with the cotton at Pernambuco to send home the shipping documents. The order to send home the shipping documents and the conditions annexed to the promise to accept, that the shipping documents shall be sent to them, are for the protection of the bankers, and not, as it seems to me, in any way for the protection of the persons who negotiate the bills of exchange."

Degree of property acquired by banker

The degree of property which the banker acquires by possession of the documents would probably depend on the purpose for, and arrangement under, which he received them. Cases of sale like *Shepherd v. Harrison* (v), where the absolute property necessarily vests in the acceptor on his accepting the bill, do not stand on the same footing as cases where the goods are only to constitute security.

In *Banner v. Johnston*, the expression is that on acceptance the 'cotton passes into the hands of the bankers themselves'.

In *Re Howe, Ex parte Brett* (w), it is implied that where a person accepts bills, not being under actual liability to do so, on having bills of lading transferred to him, those bills become part of his estate, though he can only hold them as security for the liability he incurs on behalf of the drawer. Probably there is a kind of mixed property in the goods, both drawer and acceptor having a defeasible interest therein, the acceptor's interest extending to justify anything necessary for his protection or indemnity (y).

Banker not accepting bill

If the banker does not accept the bill of exchange he has no right to keep the bill of lading or other document of title, and no property in the goods passes to him (z).

As between the banker and the customer, an undertaking to forward bills of lading against acceptance will give the banker who has accepted the bill an equitable claim to the bill of lading, equivalent to a valid hypothecation of it, which would hold good against the customer's trustee in bankruptcy (a).

(v) (1871), L.R. 5 H.L. 116; 39 Digest 520, 1355.

(w) (1871), 6 Ch. App. 838; 41 Digest 392, 2353.

(y) See *Chalmers' Bills of Exchange*, 10th ed., p. 355; contrast *The Odessa*, [1916] 1 A.C. 145; 37 Digest 13, 88; with *The Prinz Adalbert*, [1917] A.C. 586; 41 Digest 390, 2341.

(z) Sale of Goods Act, 1893, s. 19, sub-s. (3); 17 Halsbury's Statutes 623; cf. *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q.B. 643; 39 Digest 519, 1352; *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918] 2 K.B., at p. 664; 6 Digest 161, 1037; cf. *The Orteric*, [1920] A.C. 724, 733; 41 Digest 387, 2318.

(a) *Luischer v. Comptoir d'Escompte de Paris* (1876), 1 Q.B.D. 709; 41 Digest 388, 2327.

But as against third parties, it would seem that nothing short of possession of the documents, or at least constructive possession of them, as by their having been posted to the banker, will give him a good title to the goods.

Letters of credit are divided into revocable or unconfirmed credits and confirmed credits. Referring to the former class, BAILHACHE, J., in *Cape Asbestos Co., Ltd. v. Lloyds Bank, Ltd.* (b), is believed to have said that an unconfirmed credit was practically useless, and that he would never accept an unconfirmed credit in any circumstances whatever. In the same case he expressed the opinion that a banker is not bound to give notice of the revocation of an unconfirmed credit.

But so long as the credit is in force and the documents presented are in order, the banker is bound to accept the bills and liable in damages if he does not do so (c).

Questions have been raised as to whether a confirmed credit is revocable. *Panoutsos v. Raymond Hadley Corporation of New York* (d) was the case of a revocable credit, but the Court of Appeal assumed throughout that a confirmed banker's credit was necessarily irrevocable. In *Stein v. Hambro's Bank*, *ubi supra*, where the buyer had instructed the bank to refuse payment under a confirmed credit, ROWLATT, J., said :

"The obligation of the bank is absolute and is meant to be absolute, that when the documents are presented they have to accept the bill. That is the commercial meaning of it."

Damages were given against the bank.

Bills drawn against goods

It is not uncommon to find on the face of a draft mention of a cargo or credit against which it is drawn, such as 'Against credit No. 20'. 'Pay to my order £100, which place to account cargo per "Acacia".' 'Pay A. or order £1000, and place the same to account cotton shipments as advised.' It would appear that this does not create a charge even in favour of the drawee who accepts (e). The remark of MELLISH, L.J., in *Robey & Co.'s Perseverance Ironworks v. Ollier* (f), that

"A mercantile man who is intended to have a lien on a cargo expects to have the bill of lading annexed",

though primarily directed to the case of an indorsee, seems of general application. Such a statement on the face of a bill clearly gives no claim on the goods to holders of it, in case of

(b) [1921] W.N. 274 ; Digest Supp.

(c) Cf. *Stein v. Hambro's Bank* (1922), 10 Ll. L. Rep. 529 ; "Journal of Institute of Bankers", vol. xliii, p. 85 ; *Urquhart Lindsay & Co., Ltd. v. Eastern Bank, Ltd.*, [1922] 1 K.B. 318 ; 39 Digest 409, 433.

(d) [1917] 2 K.B. 473 ; 39 Digest 467, 924.

(e) See *per* COTTON, L.J., in *Phelps, Stokes & Co. v. Comber* (1885), 29 Ch. D., at p. 819 ; 39 Digest 631, 2289.

(f) (1872), 7 Ch. App. 695, at p. 699 ; 6 Digest 298, 1986.

dishonour of the bill (g). The authority of *Frith v. Forbes* (h), so far as it militates against this rule, was displaced by *Brown, Shipley & Co. v. Kough* (j).

Position of acceptor

A bank which has, under a letter of credit, accepted bills in this form is, therefore, not in any sense a trustee for the holders of those bills, with respect to the goods or securities pledged as security, and the bill-holders have no right to question the bank's dealings with such goods or securities (k).

Assignment of rights by drawer

The drawer of the bill may, however, by formal agreement, apart from the bill, transfer his remaining rights in the goods or securities to a specific person, who may be the holder of the bill. Such assignment, however, cannot affect the rights of the acceptor to raise the money for payment of the bills, if so provided, or, in any event, to indemnify himself out of the goods or securities deposited with him; it only gives the transferee the same right as the drawer possesses, namely, to require that the goods and securities should be applied to the payment of the bills, independent, to that extent and no further, of the general lien or right of set-off.

Ex parte Waring

The rule in *Ex parte Waring*, *ubi infra*, which is an apparent exception to the rule that a bill-holder, as such, has no claim on the goods, though mentioned on the bill as being drawn against, is in no way inconsistent therewith. That rule is in no sense derived from contract, but simply from the necessities of adjusting in Court the equities between two insolvent estates, both of which are liable to the bill-holder, and one of which holds goods or securities of the other's as cover for the bills (l). In fact, in the original case of *Ex parte Waring* (m), there was no reference whatever on the bill to the goods against which it was drawn; and the same was the state of facts in other cases which were decided on the authority of that case.

Even where the holder of the bill of exchange has had the bill of lading with it, he will not be entitled to claim specific appropriation of the goods to the acceptance, if he took the bill of lading with notice of the acceptor's right to have it on

(g) *Inman v. Clare* (1858), John., at p. 776; 3 Digest 250, 738; *Banner v. Johnston* (1871), L.R. 5 H.L. 157; 3 Digest 253, 747; *Robey & Co.'s Perseverance Ironworks v. Ollier*, *ubi supra*; *Re Suse, Ex parte Dever* (1884), 13 Q.B.D., at p. 777; 3 Digest 250, 739.

(h) (1862), 4 De G. F. & J. 409; 41 Digest 390, 2346.

(j) (1885), 29 Ch. D. 848; 41 Digest 391, 2350.

(k) See *per* LORD HATHERLEY, in *Banner v. Johnston*, *ubi supra*, at p. 168.

(l) See note by Sir M. Chalmers, *Bills of Exchange*, 10th ed., p. 360.

(m) (1815), 19 Ves. 345; 3 Digest 302, 967.

acceptance. In *Re Suse, Ex parte Dever* (n), the letter of credit provided that the bills of lading were to accompany the bills of exchange, but were to be surrendered to the acceptors against their acceptances. This had been shown to the holders, and the bills referred to it. The bills of lading having accompanied the bills and having been delivered up to the acceptors on acceptance, it was held that the holder could not claim any specific appropriation of the goods to meet the acceptances, the acceptors having failed.

Bills payable on delivery of documents

A bill accepted conditionally, payable on delivery of the bill of lading, has much the same effect as if the acceptor held the bill of lading. The acceptor incurs no liability unless the bill of lading is tendered to him before or at the time of presentment for payment. The acceptor gets, in a sense, a security for his acceptance on the goods, and at the same time this does not interfere with the holder having the bill of lading with the bill, and so obtaining a security on the goods in case the bill of exchange is dishonoured (o). Of course, such an acceptance is a qualified one (p), and the drawer and indorsers prior to acceptance would be discharged under s. 44 of the Bills of Exchange Act (q), unless they had expressly or impliedly authorised the holder to take a qualified acceptance, or subsequently assented to his having done so.

Documents on due date

If such an acceptor requires the bills of lading to be delivered to him on the day the bill falls due, as he very possibly might in order to carry out a sub-sale, he must clearly specify this in his acceptance; if the acceptance is in the form 'Payable on delivery up of bills of lading', the acceptor is not discharged by the bills of lading not being tendered prior to or on that day (r).

The holder, or banker on his behalf, who presents for acceptance or payment a bill with bill of lading or other documents attached or accompanying, does not guarantee or represent the genuineness of the bill, bill of lading or other document or the existence of the goods, although the latter are referred to on the face of the bill (s). In that case the following problem was raised, but not decided. A man has negotiated to him in this country a foreign instrument drawn on England to which a bill of lading is attached. This instrument is in form a regular,

(n) (1884), 13 Q.B.D. 766; 41 Digest 390, 2348.

(o) *Re Howe, Ex parte Brett* (1871), 6 Ch. App., at p. 841; 41 Digest 392, 2353.

(p) *Smith v. Vertue* (1860), 9 C.B.N.S. 214; 6 Digest 64, 513.

(q) 2 Halsbury's Statutes 55.

(r) *Smith v. Vertue* (1860), 9 C.B.N.S. 214; 6 Digest 64, 513.

(s) *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918] 2 K.B. 623; 6 Digest 161, 1037.

valid bill by English law, but owing to its method of allusion to the goods it is, by the law of its place of issue, not a negotiable bill, but only an equitable assignment. He presents the document for acceptance. It is accepted. He presents it for payment, and it is paid. It turns out that the bill of lading was forged by drawer, there are no goods to answer it or the reference on the instrument, and the instrument was fraudulently issued. Holder took it for value and in good faith and there is no question of forged indorsement.

The Court said holder could have sued acceptor if the bill had been dishonoured under s. 72 (1) (b) (i), and recognised the incongruity that would arise if acceptor, having paid, were entitled to recover the money back from the holder, but suggested no solution of the puzzle.

It was not necessary to determine the question; the Guaranty Trust Co. having negotiated the bill after acceptance, it was ultimately paid to the London City and Midland Bank, the holders at maturity. It is submitted that, if the question arose in direct and concrete form, no Court would countenance the absurdity of acceptor paying with one hand and taking back with the other, but would either interpret s. 72 (1) (b) as implying, in the right to sue, the right to keep the money when paid without action, or would treat the case as one of payment on a negotiable instrument (u), the instrument being such, namely, a bill, by the law of this country, where payment was made, or would hold it an English bill *ab initio*, being drawn on England in English (w).

Parts of bills of lading

As to the inconveniences and risks involved by the custom of giving bills of lading in more parts than one, see the remarks of LORD CAIRNS in *Glyn, Mills & Co. v. East and West India Dock Co.* (y), and of LORD BLACKBURN, at p. 605. LORD CAIRNS suggests that any person advancing money upon a bill of lading, and seeing, as he would, that it had been signed in more parts than one, should insist on all the parts being brought in. LORD BLACKBURN recognises the difficulty of a banker enforcing such a demand without offending his customer, but the practice of London bankers is to require the full set or a proper indemnity (z).

(i) 2 Halsbury's Statutes 72.

(u) See *ante*, 'Payment by Mistake'.

(w) See *Re Marseilles Extension Railway and Land Co.*, *Smallpage's and Brandon's Cases* (1885), 30 Ch. D. 598; 6 Digest 48, 351; cf. *Koechlin et Cie v. Kestenbaum Brothers*, [1927] 1 K.B. 889; Digest Supp.

(y) (1882), 7 App. Cas. 591, at pp. 599, 600; 41 Digest 393, 2362.

(z) *Questions on Banking Practice*, 8th ed., Q. 617; cf. *Scott (Donald H.) & Co., Ltd. v. Barclays Bank, Ltd.*, [1923] 2 K.B. 1, *per* BANKES, L.J.; 39 Digest 579, 1816.

SECTION 5.—CHANGE IN CHARACTER OF PARTIES AFFECTING DEPOSIT OF SECURITIES

Strictly speaking, if any change occurs in the constitution of the body holding securities for advances, further advances would not be covered by those securities. Theoretically they were deposited to cover debts due to a specific body of persons, and are, therefore, not available for obligations contracted with what in law would be a distinct entity (*a*).

Joint stock companies—absorption ; amalgamation

The mere alteration of the composition of a joint stock company or corporation would of course have no such effect, inasmuch as the body remains the same ; nor would the absorption into it of smaller concerns if their identity were completely sunk (*b*). If it were the bank to which the securities were given which was absorbed, the securities would hold good to the absorbing bank for existing, but not for future, advances.

Bradford Old Bank v. Sutcliffe (*c*) was the case of a guarantee. The guaranteed bank was absorbed, and it was contended that this discharged the guarantors, the principal having accepted the new bank as his creditors. The Court held this was not so, PICKFORD, L.J., saying (*d*) :

“ There can be no doubt that a novation by which the original debtor is released from his debt discharges the surety, but a transfer of an existing and ascertained debt to another creditor stands on a different footing. In order to discharge the surety it must effect a material alteration in his position . . . and, as the liability is ascertained, it is matter of no consequence to the surety to whom he has to pay it.”

So, in the same case, BANKES, L.J., says the creditor may assign his debt or his securities without releasing the surety. The principle appears to cover an analogous dealing with any securities (*e*). But it is only applicable where the debt is existing and ascertained, that is up to the time of the absorption. See *post*, ‘Guarantees’.

The same would be the result of amalgamation as distinct from absorption : the securities could only be relied on for outstanding advances at that date. *Commercial Bank of Tasmania v. Jones* (*f*) was a case of novation such as is referred

(*a*) *Per* LORD ELDON, C, in *Ex parte Kensington* (1813), 2 Ves. & B. 79, at p. 83 ; 35 Digest 260, 189 ; *Lindley on Partnership*, 10th (1935) ed., p. 168.

(*b*) *Capital and Counties Bank v. Bank of England* (1889), 61 L.T. 516 ; 3 Digest 132, 74 ; *Prescott, Dimsdale, Cave, Tugwell & Co., Ltd. v. Bank of England*, [1894] 1 Q.B. 351 ; 3 Digest 132, 75.

(*c*) [1918] 2 K.B. 835 ; 26 Digest 68, 483.

(*d*) *Ibid.*, at p. 842.

(*e*) See also *Re Gye and Hughes, Ex parte Smith* (1841), 2 Mont. D. & G. 314 ; 35 Digest 376, 1179.

(*f*) [1893] A.C. 313 ; 26 Digest 35, 219.

to by PICKFORD, L.J. There, for consideration, the guaranteed party absolutely released one surety, and the co-surety was held released.

Change in character of borrower

Again, a security may cease to be effectual as cover for further advances by reason of a change in the personality of the borrower. A change in the firm depositing the security might have this effect (g); and in a case cited in *Lindley on Partnership*, 10th (1935) ed., p. 168, a person deposited deeds as security for advances to be made to him, and it was held that the security did not cover advances made to him and his partners.

Provision against in memorandum

Both these contingencies should therefore be provided for in any memorandum of deposit where future advances are contemplated; or when such change takes place and is not provided for in a memorandum, the matter should be put on a proper footing. As further pointed out by LORD LINDLEY, *ubi supra*, an equitable mortgage by deposit may be readily extended, even by parol, to cover advances made after a change in the firm or body with which the securities are lodged, or may be turned into a continuing security for the obligations of a firm in which a change has taken place.

In cases of amalgamation therein specified, s. 154 of the Companies Act, 1929 (h), gives the court wide power to deal with the property and liabilities if the transferor company, and this power might be utilised in this connection.

(g) *Royal Bank of Scotland v. Christie* (1841), 8 Cl. & Fin. 214, 26 Digest 207, 1620.

(h) 2 Halsbury's Statutes 875.

CHAPTER 20

REALISATION OF SECURITIES

THE banker may find himself under the necessity of resorting to his securities to recoup himself the moneys advanced. The method to be adopted must depend on the nature of the securities and the capacity in which the banker holds them.

Bills, notes and cheques

The remedy on bills, notes or cheques held either under the banker's lien or under direct pledge as collateral security, is easy and practically automatic, the person having the lien or the pledgee being in the position of holder for value and entitled to sue thereon in his own name.

Lien

A mere lien gives no power of sale, and no ground for applying to a Court to grant such power. The only method of realising securities held under such lien would seem to be by recovering judgment for the debt and then taking the securities in execution. An exception exists where the rules of the Stock Exchange attach a power of sale to the lien (a).

But in *Brandao v. Barnett* (b), LORD CAMPBELL defines the banker's lien as an implied pledge. It has been generally understood that the banker's lien conferred rights more extensive than ordinary liens, and, adopting LORD CAMPBELL's view that it is an implied pledge, the ordinary remedies of a pledgee would appear to apply, where appropriate to the character of such securities, to securities held under the lien.

Pledged goods or documents of title to goods : sale

The rights of a pledgee are briefly as follows. Where goods have been pledged, either actually, or constructively by means of the documents of title, or where securities have been pledged, as by deposit, with or without a memorandum, the pledgee has on default a power of sale without the necessity of resorting to any Court of Equity.

An expression of opinion which might be interpreted to the contrary is found in the words of LORD HERSCHELL in *North Western Bank, Ltd. v. Poynter, Son and Macdonalds* (c), where he says as follows :

(a) *Foster v. Barnard*, [1916] 2 A.C. 154, at p. 160.

(b) (1846), 3 C.B. 519, at p. 531 ; 32 Digest 227, 111.

(c) [1895] A.C., at p. 69 ; 3 Digest 277, 865.

"In the paragraph from which I have quoted these words it is pointed out that a pledge gives only a right of detention of the goods, and gives no right to sell. Where, as in the present case, the delivery of the goods is accompanied by a grant of an absolute right of sale to the pledgee, he is certainly something more than an ordinary pledgee: he has a right which a mere pledge does not convey."

The paragraph quoted was from a text-book on Scots law; the power of sale, as shown by the terms of the memorandum from the bank, set out at p. 57, accepted as the basis of the transaction by the borrowers (see p. 58), was 'an immediate and absolute power of sale', independent of any default; and it must be either to Scots law or to this exceptional right of sale that LORD HERSHELL was really referring. He seems to emphasise the word 'absolute'.

Authorities for power of sale

The authorities for the power to sell on default appear conclusive. In *Burdick v. Sewell* (d), BOWEN, L.J., says: "The pledgee of goods is entitled to sell them upon default". In *Re Morritt, Ex parte Official Receiver* (e), COTTON, LINDLEY and BOWEN, L.JJ., say:

"A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale."

What is default

Where the debt is repayable at a fixed date, the default occurs on non-payment at that date, but notice to the pledgor of intention to sell is apparently also necessary. Where the advance is for an indefinite period, demand of payment, with notice that if not complied with within a certain reasonable time the securities will be sold, is sufficient. In *Re Richardson, Shillito v. Hobson* (f), FRY, L.J., says:

"The pawnee would have a right to sell the chattel pawned, either in default of payment at the time fixed, if there be a time fixed, or in default of payment after reasonable notice if no time be fixed."

The proposition in *Re Morritt, Ex parte Official Receiver*, above quoted, is in no wise limited to pledges for advances repayable at a fixed date. *Deverges v. Sandeman, Clark & Co.* (g), is a definite recognition of the principle, but suggests that the notice ought to fix a definite day, at a reasonable future date, for repayment to obviate sale. From this case it would appear that when the transaction is strictly pledge a month's notice would be sufficient.

(d) (1884), 13 Q.B.D. 159, at p. 174.

(e) (1886), 18 Q.B.D. 222, at p. 232; 35 Digest 248, 76.

(f) (1885), 30 Ch. D. 396, at p. 403.

(g) [1902] 1 Ch. 579; 35 Digest 497, 2272.

If the pledge does not realise sufficient to cover the debt, the balance of the debt is still recoverable.

The pledgee's only remedy is by sale; he is not entitled to apply for foreclosure with a view to acquiring the absolute property in the pledge (*h*).

Where held as cover for acceptances

The position of a banker who holds bills of lading, or other documents of title to goods, as cover for his acceptances of a customer's bills, and who has obtained the warehouseman's certificates or other evidence of the attornment of the bailee, where necessary, is as follows. He is a pledgee of the goods, the consideration for the pledge being the liability he assumes on the bills at the customer's request, and the object of the pledge being his indemnification against that liability.

If the matter stands simply thus, there is no particular event which constitutes a default entitling the banker to realise. Either a default is inferred from the banker having to pay, or a power of sale is implied after he has so paid, as being essential to his indemnity. It is beyond question that, having paid, he can realise his security (*j*). In that case there are references to the banker's selling in order to put himself in funds to pay the bills. These must be read in the light of the particular facts of the case, namely, that the drawers had agreed that the bankers should be kept out of cash advances, which, as pointed out by LORD HATHERLEY at p. 167, could only be by their realising before the bills of exchange became due.

Probably the right to realise would also accrue if the drawer had undertaken to put the banker in funds to meet the bills a specified time before their maturity and had failed to do so, as this would constitute a default.

In the absence, however, of some such agreement or of a definite power to sell at any time, the banker would not be entitled to realise until he had paid the bills. Even then it would seem desirable that he should apply to the customer to reimburse him, and give him notice that, failing his doing so within a limited time, he would proceed to realise the securities.

Title-deeds of land

Title-deeds, whether of freehold or leasehold land, though of themselves in the nature of chattels, are too intimately connected with the land itself to come within the power of sale implied in a pledge. Another reason assigned for this exemption is the hardship and inconvenience that would accrue from allowing them to be dealt with apart from the land, or their small intrinsic value as compared with their

(*h*) *Carter v. Wake* (1877), 4 Ch. D. 605; 35 Digest 247, 75.

(*j*) *C. Banner v. Johnston* (1871), L.R. 5 H.L. 157; 3 Digest 253, 747.

relative importance to the landowner. They can therefore be treated only as evidence of an equitable mortgage of the land itself.

Quasi-negotiability

The doctrine of so-called quasi-negotiability, or negotiability by estoppel, would probably hardly suffice to give a right of sale on the pledge of documents not otherwise negotiable. The estoppel goes rather to the authority of the agent to deal with the document than to its nature, of which the pledgee is as competent to judge as the pledgor. Where, however, the representation, express or implied, affirms the negotiability of the document, or where a memorandum gives an express power to sell such document, the pledgor could not dispute the pledgee's right to sell.

Equitable mortgage

In all cases of doubt as to whether the deposit is the legitimate subject of pledge, it is nevertheless advisable to treat the transaction as one of equitable mortgage (*k*). Outside chattels and negotiable instruments, the pledgee would be unable of himself to make satisfactory title to a vendee.

Stocks and shares

Thus with the deposit of certificates of stock or shares. Without transfer from the holder, the deposittee could not complete a sale. Unless the depositor voluntarily executes such transfer, as he is bound to do by the agreement implied in the deposit, resort must be had to the Court, which will order foreclosure, transfer, or sale at the option of the mortgagee. A memorandum by deed of equitable deposit, not amounting to a transfer of the shares, would give a right of sale under the Law of Property Act, 1925, s. 101 (*l*), but would give no power to transfer the legal right in the shares or stock (*m*).

Where legal transfer

Different considerations prevail when stock or shares are actually transferred to a banker by way of security. He is then in a position to sell and transfer, subject to the right of the mortgagor to redeem. If there is a mortgage deed or agreement apart from the mere transfer, the banker must abide by its terms as to sale or otherwise. If such deed contains no power of sale, the banker should treat the power of sale given by s. 101 of the Law of Property Act, 1925 (*l*), as imported, and

(*k*) Cf. *Harrold v. Plenty*, [1901] 2 Ch. 314, 35 Digest 556, 2869.

(*l*) 15 Halsbury's Statutes 283.

(*m*) Cf. *Re Hodson and Howe's Contract* (1887), 35 Ch. D. 668; 35 Digest 498, 2286.

adopt the procedure prescribed thereby, giving three months' notice before selling. It was doubtful whether the mere transfer under seal by way of security constituted a mortgage by deed within the Conveyancing Act, 1881. By the 1925 Act 'mortgage' includes any charge or lien on any property for securing money or money's worth (*n*). 'Property' includes any thing in action or interest in real or personal property (*o*). Where there is nothing which can be termed a deed of mortgage and no inconsistent agreement, the mortgagee has an inherent power to sell on default; if no date is specified for payment, he can exercise such right on non-compliance with a notice requiring payment on a fixed day at a reasonable future date, and stating that on failure of payment sale will be proceeded with. A month's notice would seem reasonable (*p*).

Limitation of actions

Where securities, stocks, or shares have been equitably mortgaged, the remedy by foreclosure or sale is not barred by the expiration of the period which, under the Limitation Act, would preclude the recovery of the debt for which the security was pledged.

The personal remedy and the remedy against the property are independent, and there is no statutory provision relating to personal property similar to that relating to land, extinguishing the title to it after a certain time (*q*).

Following the policy adopted earlier in this book, realisation of securities on land is not dealt with.

Disposition of surplus on realisation

In taking securities a margin of value in excess of the liability they are to cover is always allowed. On realisation, if the security brings in more than the debt, the disposition of the balance may give rise to questions.

With regard to bills, notes, and cheques, the distinction previously alluded to between taking such documents by way of pledge and taking them as absolute transferee and owner must be borne in mind. In the latter case, the holder is entitled to the full amount irrespective of the value he gave; in the former the surplus must be treated as if it arose from the realisation of any other pledge.

Where security other than land has been given to cover specified indebtedness, and its realisation brings in more than

(*n*) S. 205 (xvi.); 15 Halsbury's Statutes 386.

(*o*) S. 205 (xx); 15 Halsbury's Statutes 387.

(*p*) *Deverges v. Sandeman, Clark & Co.*, [1902] 1 Ch. 579; 35 Digest 497, 2272.

(*q*) *London and Midland Bank v. Mitchell*, [1899] 2 Ch. 161; 35 Digest 557, 2876; *Stubbs v. Slater*, [1910] 1 Ch. 632, at p. 639; 35 Digest 497, 2274; but the attribution in the latter case of payments in to unsecured balance must now be read in the light of *Deeley v. Lloyds Bank, Ltd.*, [1912] A.C. 756; 21 Digest 343, 1313.

enough to satisfy that indebtedness, and the banker is not affected with notice of any assignment of the depositor's remaining rights or any further charge on the security, he must, of course, pay over the surplus to the debtor or hold it at his disposal.

Can retain for further indebtedness

If, however, the depositor is further indebted to the banker, say on general account, the banker can retain the surplus, or a sufficient part thereof, to cover such further indebtedness, by virtue either of his general lien or the right of set-off.

It may at first sight seem curious that immunities attaching to the security itself should not extend to what is only a converted part thereof, but the authorities are clear (*r*). In *Re Bowes, Strathmore (Earl) v. Vane (s)*, NORTH, J., while holding that the bank had no general lien on the security itself, said that if the memorandum had given a power of sale, or if such power had been obtained from the Court, the surplus proceeds would probably have been retainable by the bank by way of set-off for its further claim against the customer's estate. The explanation may be that the express or implied power of sale is an incorporated or inherent incident of the deposit, and its exercise terminates any fiduciary relation that may have existed with regard to the security itself.

Cases like *Shumore v. Campbell & Co. (t)* are distinguishable. Where money is deposited for a purpose which fails, there arises a resulting trust which affects the whole sum and puts it outside lien or set-off. In the case of securities lodged to cover a specific advance, the purpose is cover, and, if necessary, realisation; on a legitimate sale there is, therefore, no failure, but fulfilment, and no resulting trust even as to surplus proceeds. The phrase so commonly met with in this class of cases, that the creditor holds the surplus proceeds as trustee for the debtor, would seem to be really only a figure of speech; there is no actual fiduciary relation. The money is, in truth, held for the debtor's account, or as money had and received to his use; in other words, constitutes a mere debt to him, and so is subject to lien or set-off.

Surplus of goods or securities pledged to cover acceptances

The same holds good with regard to a surplus realised by sale of goods or securities pledged to cover acceptances. It was expressly declared in *Inman v. Clare (u)*, that the surplus, if any,

(*r*) *Jones v. Peppercorne* (1858), John. 430; 32 Digest 264, 264; *Inman v. Clare* (1858), John. 769; 35 Digest 514, 2449; *Re London and Globe Finance Corporation*, [1902] 2 Ch. 416; 32 Digest 241, 265, recognising *Jones v. Peppercorne*.

(*s*) (1886), 33 Ch. D. 586; 32 Digest 229, 138.

(*t*) [1892] 1 Q.B. 314; 40 Digest 408, 319.

(*u*) (1858), John. 769, at p. 776; 35 Digest 514, 2449.

was subject to the general lien of the banker or broker who paid the acceptances. The drawer's only right is to have the goods or securities or their proceeds applied to the bills, so that no liability, either direct or by increased debit, shall accrue to him in respect of those bills. This right does not affect surplus after satisfaction of the bills.

The drawer's right is assignable by agreement collateral to and independent of the bills, but the transferee can clearly take no higher right than his transferor, and has, therefore, no claim whatever with regard to the surplus balance (w).

Stamping of unlimited security

A point of some importance in regard to the realisation of a security was dealt with by FARWELL, J., in *Re Waterhouse's Policy* (x), in which he said :

"... it is quite plain that in order to make the security a security for the full [fixed] amount it is agreed should be lent, the security has to be stamped with 'the appropriate amount'. But where the advance is unlimited, then s. 88 (2) of the Stamp Act, 1891 (y), means that 'if a bank chooses to take as a security for an overdraft a security and stamps that security with a stamp which is only sufficient to cover a limited sum . . . then . . . they are precluded from claiming in a court of law or elsewhere that the security . . . is . . . for any greater sum. . . .' But if the bank is content, there is no need for any further stamp."

This decision was the subject of conversations between the Institute of Bankers and the Board of Inland Revenue, the latter refusing to accept it as calling for any change in the existing practice. While the Board do not "understand the judgment as stating that an unlimited security upon which (e.g.) £700 is owing at the time when it is presented for stamping, or has at some prior time been owing, can be 'duly stamped' to cover (e.g.) £500", the judgment nevertheless points to the contrary.

(w) *Inman v. Clare*, *supra* ; *Re Suse, Ex parte Dever* (1884), 13 Q.B.D. 766 ; 3 Digest 250, 739.

(x) [1937] 1 Ch. 415 ; [1937] 2 All E.R. 91.

(y) 16 Halsbury's Statutes 644.

CHAPTER 21

GUARANTEES

ONE of the commonest methods by which bankers protect themselves against loss on advances or overdrafts is by taking a guarantee. There are advantages attaching to this class of security. It is adaptable to most states of circumstances, present and possible, it entails few positive obligations on the banker, while it enures for him to fall back upon in case of need. There are also disadvantages. The efficacy of a guarantee is absolutely dependent on two things : first, the completeness in form of the document itself ; second, the original and continued solvency of the guarantors.

Essentials in form

With regard to the form of guarantee, the difficulty mainly arises first, from the necessity of defining very clearly the extent to which the guarantors bind themselves, and precluding them from afterwards suggesting that the bank has gone beyond what they undertook to be answerable for ; and next from the necessity of anticipating conceivable contingencies, such as death, bankruptcy, change of firm, amalgamation, taking collateral security, giving time to the principal debtor, receipt of dividends, and the like ; and of reserving to the bank the power to act on every occasion in the manner most conducive to its own interests, without prejudicing its right to resort to the guarantors for the ultimate balance due.

The law is rightly solicitous for the interests of sureties, and the main object of a guarantee should be to keep a free hand for the bank and a tight one on the guarantor. The latter object must not, however, be carried too far. General words might, no doubt, be inserted in a guarantee which, if the guarantor signed it, would make him contract himself out of all the rights of a surety, so far as the creditor was concerned. But it would be doubtful policy to resort to this. A careful guarantor would decline so to bind himself ; a careless one would afterwards contend he did not realise what it was to which he was binding himself (*a*). The surety cannot, however, claim relief on the ground of his own misconception of particular provisions or the general drift of the guarantee.

“ If the defendant had understood the words of the guarantee he would not have entered into it, and the language carried more

(*a*) Cf. *Birmingham District and Counties Bank v. Lowry* (1905), *Morning Post*, January 26th, C.A.

perhaps than the parties contemplated, but that is no reason for reading into the guarantee words, which I should have to do to hold the guarantor discharged." (b)

In *Union Bank of Manchester, Ltd. v. Beech* (c) the guarantee provided that no composition with the principal debtor should discharge the liability of the guarantor, and the surety was held bound though the creditor had discharged the principal debtor.

In *Barclays Bank, Ltd. v. Trevanion* (d) SWIFT, J., held that the form of guarantee did not contain words entitling the bank to release two of three guarantors and retain their rights against the third. The guarantee was a joint and several guarantee having clauses which the bank thought protected it in such circumstances as gave rise to the case, in particular one by which the sureties agreed between themselves that any sum which, for any reason, should not be 'recoverable . . . on the footing of a guarantee' should 'nevertheless be recoverable . . . as sole or principal debtors'.

It is largely a matter of drafting, which is outside the scope of this work. Most banks have their own form of guarantee; this should be overhauled from time to time, to make sure that it is in working order, up to date, broad and strong enough for the purposes for which it is intended. Prolixity is no criterion of efficiency.

The second necessary element in a reliable guarantee, the financial position and stability of the guarantors, is for the consideration and judgment of the banker himself.

Definition of guarantee

A guarantee is a promise to answer for the debt of another, made to a person to whom that other is already, or is about to become, liable. It must be in writing, or there must be a memorandum of it in writing, signed by the guarantor or his authorised agent, to satisfy s. 4 of the Statute of Frauds (e). An agreement to give a guarantee is within the Act; and so subject to the same rule (f). In practice, as will be gathered from the foregoing remarks, there must be a good deal more in writing than could be fairly described as a memorandum.

Analogous contracts

There are cases at first sight analogous to guarantees, which are not within the Statute of Frauds, such as contracts of indemnity and contracts for the acquirement of property by payment of another man's debt (g). The distinction between

(b) *Per WILLS, J.*, in *Stewart and McDonald v. Young* (1894), 38 Sol. Jo. 385.

(c) (1865), 3 H. & C. 672; 26 Digest 197, 1547.

(d) "The Banker" (1933), vol. xxvii, 98.

(e) 3 Halsbury's Statutes 583.

(f) *Mallet v. Bateman* (1865), L.R. 1 C.P. 163; 26 Digest 29, 173.

(g) *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778; 26 Digest 43, 286.

a verbal promise to answer for the debt of another and a contract of indemnity is fully defined in *Davys v. Buswell* (h), by the Court of Appeal. The fact that the guarantor is himself interested in the matter calling for the guarantee does not prevent its being a guarantee (j). But special precautions are necessary where directors of a company guarantee an obligation of the company and it is proposed to issue debentures to the bank as security. It has been held that, in such case, the directors are interested in such debentures and the debentures worthless (k).

In *Wauthier v. Wilson* (l) a father and son gave a joint and several promissory note for money lent to the son, who was under age. PICKFORD, J., held the father liable as guarantor for the son's debt. The Court of Appeal held him liable as the principal debtor. The ordinary transaction, however, by which a banker allows a man credit on another's undertaking to see him paid, is a guarantee pure and simple, for which reason, if for no other, writing and signature are essential.

There are, however, certain points to be considered before dealing with the guarantee itself.

Married woman

A married woman may be a guarantor and liable to the extent of her separate estate, but any possible suggestion of undue influence on the part of the husband, especially if he be the principal debtor, should be put out of the question (m), though it is for her to prove that she did not act voluntarily (n). The difficulty is overcome by her obtaining independent legal advice, which must be given at the time the liability is undertaken by her (o).

Disclosure

The contract of guarantee is not one of those classed as *uberrimae fidei*, requiring full disclosure of all material facts by one or both of the parties. Non-disclosure by a bank, to a guarantor of a customer's overdrawn account, of facts from which the bank had suspicions that the customer was defrauding the guarantor was held not to invalidate the guarantee, in *National Provincial Bank of England, Ltd. v. Glanusk* (p); *Royal Bank of Scotland v. Greenshields* (q).

The banker is not bound to volunteer to a proposing guarantor information as to the customer's financial position

(h) [1913] 2 K.B. 47; 26 Digest 42, 281.

(j) *Davys v. Buswell*, *ibid.*

(k) *Victors, Ltd. v. Lingard*, [1927] 1 Ch. 323; Digest Supp.

(l) (1912), 28 T.L.R. 239; 6 Digest 50, 374.

(m) Cf. *Bank of Montreal v. Stuart*, [1911] A.C. 120; 26 Digest 218, 1725.

(n) *Nedby v. Nedby* (1852), 5 De G. & Sm. 377; 27 Digest 168, 1365.

(o) *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A.C. 127; Digest Supp.

(p) [1913] 3 K.B. 335; 26 Digest 215, 1700.

(q) [1914] S.C. 259; 3 Digest 163, 250 i.

or business habits, however material such information might be. But if questioned by the intending surety, on a point which might have a material bearing on his entering or not entering into the guarantee, he must give the requisite information (*r*), honestly and to the best of his ability, the occasion justifying disclosure of the customer's account or the customer's authority for such disclosure being implied in the introduction of the surety. In *Hamilton v. Watson* (*r*), LORD CAMPBELL held that disclosure would otherwise be a duty only where what had taken place between the bank and the principal debtor was not naturally to be expected.

Hamilton v. Watson (*r*) was cited with approval by VAUGHAN WILLIAMS, L.J., in *London General Omnibus Co., Ltd. v. Holloway* (*s*) and by POLLOCK, M.R., in *Lloyds Bank, Ltd. v. Harrison* (*t*). See also *Westminster Bank, Ltd. v. Cond* (*tt*) and *Cooper v. National Provincial Bank, Ltd.* (*u*).

Misrepresentation

It would seem that any misrepresentation, emanating from the bank, as to the nature, contents or effect of the guarantee would entitle the surety to rescind or treat the instrument as rescinded. In *Carlisle and Cumberland Banking Co. v. Bragg* (*v*) in the Court of Appeal, the bank handed the draft guarantee to Rigg, its customer. He presented it to Bragg, the proposed surety, telling him it was an insurance paper. Bragg signed. Rigg forged the witness's signature and got the advance. The bank sued Bragg on the guarantee. Judgment for defendant affirmed. The jury had found that Rigg was not the agent of the bank in the matter, so that the question was not one of misrepresentation, but of *non est factum*, whether it was Bragg's deed or not. BUCKLEY, L.J., said :

"The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed . . . if . . . he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case it is not his deed."

Again he says that the effect is the same if the man is incapable of ascertaining or is by false information deceived in a material respect as to the contents of the document which he is asked to sign ; which carries the matter somewhat further.

In *Howatson v. Webb* (*w*), *non est factum* was held no defence, the misrepresentation being only as to the contents

(*r*) *Hamilton v. Watson* (1845), 12 Cl. & Fin. 109 ; 26 Digest 215, 1696.

(*s*) [1912] 2 K.B. 72 ; 26 Digest 214, 1691.

(*t*) (1940), 46 Com. Cas. 60 ; 2nd Digest Supp.

(*tt*) [1946] K.B. 1 ; [1945] 2 All E.R. 641 ; 2nd Digest Supp.

(*u*) [1911] 1 K.B. 489 ; 35 Digest 12, 52.

(*w*) [1907] 1 Ch. 537 ; 17 Digest 235, 500.

(*r*) (1925) (unreported).

of a deed known by the defendant to deal with property of his. WARRINGTON, J., at p. 545, said :

“ . . . I have had no case cited which carries the plea further than that a misrepresentation as to the nature and character of the document avoids it.”

Where the representation is made by a person other than the man who seeks to enforce the contract or his agent, it may well be that the misrepresentation must be as to the actual character of the instrument ; that where BUCKLEY, L.J., speaks of the man being deceived by misrepresentation in a material respect as to the contents of the document he means as to its contents as a whole, not as to its legal significance or effect or any particular provision therein contained or alleged to be contained.

But where the representation can be brought home to the party seeking to uphold or enforce the contract, it is pretty clear that the character of the misrepresentation sufficient to avoid the contract is not so narrowly circumscribed. *Non est factum* is one thing, misrepresentation is another.

MacKenzie v. Royal Bank of Canada (y) was a Privy Council case in which the plaintiff successfully repudiated her guarantee on the ground that the bank had misrepresented to her the position concerning some shares which she had earlier charged as security. There were a series of surety transactions, but when the particular guarantee was executed the bank represented to her that her shares were bound to the bank—whereas they were released from charge—and that she stood a chance of getting them back if she signed the guarantee. The case was succinctly put by LORD ATKIN, giving the decision of the Board, as follows :

“ A contract of guarantee, like any other contract, is liable to be avoided if induced by material representation of an existing fact, even if made innocently. In this case it is unnecessary to decide whether contracts of guarantee belong to the special class when, even at common law, such an innocent misrepresentation would afford a defence to an action upon the contract. The evidence conclusively establishes a misrepresentation by the bank that the plaintiff's shares were still bound to the bank with the necessary inference, whether expressed or not, and their Lordships accept the plaintiff's evidence that it was expressed, that the shares were already lost, and that the guarantee of the new company offered the only means of salving them. It does not seem to admit of doubt that such a representation made as to the plaintiff's private rights and depending upon transactions in bankruptcy, of the full nature of which she had not been informed, was a representation of fact. That it was material is beyond discussion. It consequently follows that the plaintiff was at all times, on ascertaining the true position, entitled to avoid the contract and recover her securities. There were subsequent renewals of the guarantee before the plaintiff was advised of the true facts, but counsel for the bank very properly conceded that they would be in the same position as the

original guarantee. There is no difficulty as to *restitutio in integrum*. The mere fact that the bank, the party making the representation, has treated the contract as binding and has acted on it does not preclude relief. Nor can it be said that the plaintiff received anything under the contract which she is unable to restore."

The entrusting the guarantee to the principal debtor, to get it executed by the surety, as was done in *Carlisle and Cumberland Banking Co. v. Bragg*, is not an uncommon thing. In that case the jury found that the principal debtor was not the agent of the bank. Had they found otherwise, one can gather that the Court would not have had much difficulty in dealing with the case. In another case, another jury, or the judge, might well find the other way. It is sometimes difficult to differentiate between an emissary or messenger and an agent. If the guarantee were sent to the surety in a closed envelope by a bank messenger who was simply to bring it back, there could be no question of agency, even if he took upon himself to make representations as to it.

But where it is given to the principal debtor to get signed, one gets nearer to agency. There would be no distinct agency to make representations, to do anything more than get the signature; but inferences might be drawn pointing to such agency. Something might turn on what was said by the bank when entrusting the principal debtor with the document. If the manager said: 'If you bring this back signed, and witnessed, we will let you have the money', that looks like making him a mere messenger or leaving him to act independently and on his own authority and initiative. If the manager said, 'Go and get this signed by Mr. A. and witnessed, and we will let you have the money', that seems to import an element of agency, and what the debtor said and did might, on the jury taking that view, be held binding on the bank, whether the representation, which would infallibly not be innocent, justified the plea of *non est factum* or not. Negligence on the part of the signer is not sufficient to debar him from setting up that it is not his act and deed, or that he was misled by the representation (2). The safest course would seem to be always to have the guarantee signed and witnessed at the bank, so as to avoid any question of this sort, or else to send it direct to the surety with a simple covering letter, asking him to be good enough to sign and have it witnessed in accordance with previous arrangement, and return it.

MAIN POINTS OF AN EFFECTIVE GUARANTEE

Judgment against one of many guarantors

Turning now to the question of the form of an efficient guarantee, the main points to be kept in mind are as follows:

(2) See the *Carlisle and Cumberland Banking Co. Case*, *supra*,

If there is more than one guarantor, their obligation must be made several or joint and several. If it be joint only, an unsatisfied judgment against one, save possibly under exceptional procedure, constitutes a bar to any action against the other or others (a). The case of *Morel Brothers & Co. v. Westmorland (Earl)* (b), must not be understood as implying that a similar result would follow when the obligation was joint and several. The judgment against the wife in that case barred the remedy against the husband, even on the supposition of an original several liability, because the liability of husband and wife could only be alternative, being that of principal and agent, and the judgment against one operated as a conclusive election (c).

The remedy against joint and several guarantors is not alternative, but cumulative, until the whole debt is not only recovered, but satisfied.

From the point of view of the party taking the guarantee, a guarantee by each of the co-guarantors severally would be quite satisfactory; but, as above shown, the fact of its being joint and several does not affect him, and it may have advantages for the guarantors.

The guarantors should always bind themselves, their executors and administrators; and if under seal, their heirs as well. The executors or administrators would in any event be bound, but their specific inclusion may be useful in the case of death of the surety and notice thereof, hereinafter mentioned.

Limited or unlimited

It may be intended that the guarantor's liability shall be limited. If so, the limitations must be strictly defined. Where a fixed sum is inserted as the limit of the surety's liability, it must be carefully stipulated whether the surety is surety for the whole debt, with the specified limitation to his total liability, or whether he is surety only for part of the debt (cc). The former is the more advantageous for the person guaranteed, inasmuch as it entitles him, on the bankruptcy of the principal debtor, to dividends on the whole debt from his estate, notwithstanding that the surety has paid the full sum he guaranteed; whereas in the latter form the surety, having paid his liability, is entitled to the dividends on that amount (d).

A slight variation in the wording is sufficient to assign the liability to one category or the other, and it is therefore always desirable to supplement the statement of the liability, and

(a) *Kendall v. Hamilton* (1879), 4 App. Cas. 504; 26 Digest 201, 1571.

(b) [1904] A.C. 11; 21 Digest 224, 579.

(c) Cf. *French v. Howie*, [1906] 2 K.B. 674; 21 Digest 224, 580.

(cc) See *Ellis v. Emmanuel* (1876), 1 Ex. D. 157; 26 Digest 90, 627.

(d) See *Re Rees, Ex parte National Provincial Bank of England* (1881), 17 Ch. D. 98; 26 Digest 120, 851; *Re Sass, Ex parte National Provincial Bank of England*, [1896] 2 Q.B. 12; 26 Digest 90, 628.

anticipate any question, by adding a clause or proviso, such as proved so efficacious in both the above-mentioned cases, under which the surety contracts himself out of any such possible equity in plain and distinct terms.

Amount advanced and amount guaranteed

Care must also be exercised that the limitation applies to the amount guaranteed, and not to the amount advanced. If such words as 'In consideration that you will advance to A. B. a sum not exceeding £250, I guarantee you the payment of that amount', were used, the guarantee might be invalidated *in toto* by the advance of a sum exceeding £250.

Specific and continuing

Guarantees are further divided into specific and continuing. The first are where provision is made for the advance of a specified sum or for advances up to a fixed limit, and the guarantee is applicable only to that particular advance or series of advances, and ceases on repayment thereof. The continuing guarantee is the commoner form, and is designed to cover a fluctuating or running account, securing the debit balance at any time, irrespective of payments which obliterate past advances.

In *Westminster Bank, Ltd. v. Sassoon* (e) the Court of Appeal (BANKES, SCRUTTON and SARGANT, L.JJ.) dismissed the appeal of Mrs. Guilia Sassoon from a decision of ROWLATT, J., given for the bank. Mrs. Sassoon guaranteed the account of the Marquis Guido Serra di Cassana for £1,700, undertaking to hold herself liable for a year only. The guarantee was signed on 3rd July, 1924, and at the end of the document were added the words: 'This guarantee will expire on June 30, 1925'. The bank called on the defendant to pay in October, 1925. In reply to the contention that the guarantee was for a limited period and that the defendant was not liable for claims made after that date, the bank pleaded, and it was held, that the guarantee was a continuing one.

Here, again, the plainest terms should be used to express the continuous character of the obligation. The words 'ultimate balance' are sometimes used in this connection. They are useful as pointing to the continuing nature of the guarantee; but if there are more accounts than one, and the guarantee is intended to apply exclusively to one, without bringing in any credit balance there may be on another, this must be clearly defined. 'Ultimate balance' primarily means the sum finally owing, combining all accounts (f). If this is what it is desired to secure, it should be clearly expressed.

(e) (1926), *Times*, November 27th, 1926.

(f) See *Mutton v. Peat*, [1900] 2 Ch. 79; 3 Digest 272, 848.

Question of 'due or owing'

Guarantees, particularly continuing ones, very frequently describe the amount to be covered as that 'now or at any future time due or owing from' the principal debtor. This appears an undesirable form. Although it has passed without objection in many cases (g), the case of *Re Moss, Ex parte Hallet* (h), points to the danger of using such words as 'debt', 'due or owing', in connection with the principal debtor. On the authority of that case it might well be held that bankruptcy of the principal debtor, the very contingency against which the guarantee ought to be a safeguard, wipes out the debt or precludes it from being due or owing from the bankrupt, so that, under such words as the above, there is nothing for which the guarantor is liable. The case directly decides that interest guaranteed on money due or owing from the principal debtor ceases to be recoverable as from his bankruptcy (j). The liability of the guarantor should be defined as being for all moneys advanced to or paid for or on account of the principal debtor and interest thereon remaining unpaid or until repayment thereof, or words to that effect, or otherwise fitted to avoid any such question (k).

Existing overdraft or debt

It must be stated whether the liability is to extend to existing overdraft or debt, if any, as well as to future advances. This is sometimes involved in the statement of the consideration. It is not necessary that the consideration should be set out in the guarantee (l). But if it is set out, it should be done correctly. Such forms as 'in consideration of your having advanced A. B. £500', or 'in consideration of your having allowed A. B. to overdraw his account with you to the extent of £500', are obviously wrong. The mere antecedent debt of a third person is no consideration for a promise.

It is true that the statement of a consideration is not conclusive, and another consideration may be supplied by external evidence. The real consideration, where further advances are not stipulated for, is the forbearance of the creditor to sue or press the debtor: "... where a creditor asks for and obtains a security for an existing debt, the inference is that but for obtaining the security he would have taken action which he forbears to take on the strength of the security" (m). The

(g) E.g., *Re Rees, Ex parte National Provincial Bank of England*, *supra*; *Re Sass, Ex parte National Provincial Bank of England*, *supra*.

(h) [1905] 2 K.B. 307; 26 Digest 85, 603.

(j) Cf. *Stacey v. Hill*, [1901] 1 K.B. 660; 26 Digest 195, 1522.

(k) Cf. *Re Fitzgeorge, Ex parte Robson*, [1905] 1 K.B. 462; 26 Digest 87, 610.

(l) Mercantile Law Amendment Act, 1856, s. 3; 3 Halsbury's Statutes 585.

(m) *Per PARKER, J.*, in *Glegg v. Bromley*, [1912] 3 K.B. at p. 491; 25 Digest 167, 133.

existence of this consideration has also been implied from the nature of the transaction as between business men (*n*). But, in the absence of statement in writing, it must always remain a matter of deduction whether any claim was contemplated, and if so, whether it was forborne at the request of the guarantor (*o*).

The Northern Ireland Court of Appeal, deciding the case of *Provincial Bank of Ireland v. Donnell* (*p*), held that the guarantee in the case was unenforceable for lack of consideration, because the agreement (1) could not be construed as a forbearance to sue, and (2) only amounted to an intimation that the bank might make further advances, that it was not bound to do so and that, in fact, it did not. The guarantee was given for the payment of premiums on an insurance policy charged to cover an overdraft which was dormant.

Where, therefore, the only consideration is the forbearance to press for an existing debt, this should be clearly specified, and the time for which such forbearance is to last stated. 'Reasonable time' is too vague and incapable of definition, while 'so long as you may think fit', or words leaving the respite entirely in the hands of the creditor, would render the sufficiency of the consideration doubtful. It should be borne in mind that it is always open to the surety to challenge the validity of the debt or obligation he has guaranteed. A curious example of this is *Gaskell, Ltd. v. Askwith* (*q*), in which HUMPHREYS, J., gave judgment for the defendant, the surety, on the ground that the promissory note, payment of which he had guaranteed to a moneylender, did not comply with the requirements of the Moneylenders Act, 1927.

Method of future advances

The method by which future advances are to be made should be formulated in accordance with the intention of the parties, or in such general terms as to include all methods likely to be adopted, as, for instance, the acceptance and discounting of bills. Interest and banking charges should be provided for. With regard to the former, it is sometimes desirable to stipulate for the method in which it is to be, or may be, charged or reckoned, as by yearly or half-yearly rests; and some draftsmen insert a provision that this method of charging shall continue, notwithstanding that the relation of mortgagor and mortgagee has superseded that of customer and banker. This would only come into operation where a mortgage was taken

(*n*) See *per* NORTH, J., in *Re Clough, Bradford Commercial Banking Co. v. Cure* (1885), 31 Ch. D., at p. 326; 36 Digest 396, 679; and *Fullerton v. Provincial Bank of Ireland*, [1903] A.C., at p. 316; 12 Digest 189, 1459.

(*o*) *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266; 26 Digest 24, 134.

(*p*) [1934] N.I. 33.

(*q*) (1929), 45 T.L.R. 439.

for a specific sum, and not for a fluctuating balance (*r*), and it would introduce much complication if the accounts had to be kept in one way against the customer and in another against the surety.

Conditions of determination

Where the guarantee is to be a continuing one the conditions of its determination should be clearly marked. A guarantor is not entitled, without determining the guarantee, to call upon the principal debtor to release or indemnify him (*s*). A guarantor is, in ordinary cases, entitled to determine the guarantee as to future advances at any time by notice, and by paying, if so required, what is then due on or within the limit of his guarantee (*t*). Even if the guarantee is for a specified period, or is under seal, this right probably exists in equity, if not at law (*u*), unless the banker were under contract bound to make further advances to the principal debtor (*w*). It is generally found advisable to impose restrictions on this power. It may be provided that the liability of each guarantor shall only be determinable on the expiration of specified notice, to be given by him in writing, and on payment of all sums outstanding at the date of receipt of such notice, or subsequently accruing by virtue of any engagement entered into prior to receipt of such notice, which, if such notice had not been given, would have been covered by the guarantee. The sort of case to be anticipated is that of a bill accepted by the bank on the faith of the guarantee prior to receipt of notice, but not falling due till after expiration thereof (*v*).

Advances after notice of determination

If so desired, the form might be further extended to cover any and all advances or obligations made or entered into after notice given and before its expiration. There has been a good deal of discussion whether and how far, in the absence of any such provision, purely voluntary advances up to the limit of the guarantee, made during the currency of the notice, are recoverable against the guarantor who has given such notice. The question arose on the following hypothetical case. B. gives a bank a guarantee for A.'s account for £1,000, which runs: 'That it shall be a continuing guarantee for the benefit of the said bank, however for the time being constituted, until the expiration of three months after notice in writing shall

(*r*) See *National Bank of Australasia v. United Hand in Hand Bank of Hope Co.* (1879), 4 App. Cas., at p. 410; 3 Digest 266, 821.

(*s*) *Morrison v. Barking Chemicals Co., Ltd.*, [1919] 2 Ch. 325; 26 Digest 128, 916.

(*t*) *Beckett v. Addyman* (1882), 9 Q.B.D., at p. 791; 26 Digest 208, 1633.

(*u*) *Re Grace, Balfour v. Grace*, [1902] 1 Ch., at p. 738.

(*w*) Cf. *Lloyd's v. Harper* (1880), 16 Ch. D., at p. 314; 26 Digest 80, 571.

(*v*) Cf. *Holland v. Teed* (1848), 7 Hare, 50; 26 Digest 206, 1612, where the form of the guarantee was held to cover such bills.

have been given by me, my executors, administrators or assigns of determining the same'. B. gives notice of withdrawal of his guarantee when A. owes £500. Is it safe to continue transactions on the account after notice; may the balance be increased, and also will B. be liable for the whole if it go up to £1,000?

The author's own view was and the editor's is that it would not be safe or right to make purely voluntary advances up to the expiration of the notice; that advances or payments during the three months must be confined to the fulfilment of obligations express or implied incurred by the banker to the principal debtor prior to the receipt of the notice, such as the payment of outstanding cheques and the like. This view is based mainly on the duty of the guaranteed party to behave equitably towards the guarantor, recognised in *Holland v. Teed* (2), and the difficulty of seeing where the object or sense of giving notice comes in, if the guaranteed person on receiving it is at liberty at once to run the amount up to the extreme limit. The object of giving notice is to enable the guarantor to circumscribe his loss; the banker is not prejudiced by not being able to increase that loss. The position is somewhat analogous to that, apart from s. 94 of the Law of Property Act, 1925 (a), of a first mortgagee for advances, who receives actual notice of a second mortgage.

These conclusions have been disputed, mainly on the ground that the principal debtor may have made engagements and undertaken liabilities on the faith of being able to get advances up to the full amount of the guarantee; that the banker's duty is to him, his own customer, rather than to the guarantor, and that the proper construction of such a guarantee sanctions voluntary advances up to the full limit both of the expiration of the notice and the sum guaranteed. Anyway, if licence to take this course is desired, the right to do so without prejudice to recovering the full amount of the guarantee should be very clearly expressed therein, and should include obligations undertaken pending the notice but not maturing till after expiration thereof, as well as those maturing during its currency.

Whether the liability of a joint and several guarantor for future advances would be affected by the determination of the liability of his co-guarantor might be doubtful. If the analogy of the death of another joint and several surety is to be accepted, determination by one such surety would not release the other from liability for future advances. Where the sureties are joint only it is an open question whether the death of one stops the liability of the other for subsequent advances (b). Where the

(2) (1848), 7 Hare, 50; 26 Digest 206, 1612.

(a) 15 Halsbury's Statutes 273.

(b) *Re Sherry, London and County Banking Co. v. Terry* (1884), 25 Ch. D., at pp. 703, 705; 26 Digest 91, 633.

contract is joint and several, the death of one guarantor does not affect the liability of the other for subsequent advances (c). In *Egbert v. National Crown Bank* (d) a guarantee by several sureties was to continue 'until the undersigned or the executor or administrator of the undersigned shall have given the bank notice'. Held that it could not be determined by one of them, that each and all must combine to determine it. But the decision turned on the wording. LORD DUNEDIN said :

"It is not necessary to consider what is the law in the case of death when nothing is said in the guarantee about its continuation or not."

It is, therefore, wise to make it quite clear in the guarantee that neither determination by nor the death of one co-surety is to have any effect on the continuing liability of the other for past or future advances.

Formal notice of death of surety

Again, provision should be made for formal notice of the death of a surety before the liability of his estate for subsequent advances terminates.

Effect of death

The mere fact of the death probably does not put an end to the guarantee, which is a contract. *Bradbury v. Morgan* (e), is a direct authority to this effect. But later cases are less positive on the point. In *Harriss v. Fawcett* (f), MELLISH, L.J., says :

"As mere matter of law, although it is not necessary, perhaps, positively to decide it, I am of opinion that this guarantee was not determined by the death. If one were to suppose a case, which might very easily happen, where a bank holding such a guarantee was not aware of the death, I should think it very hard upon the bank to hold that a guarantee worded like this was terminated by the death of the guarantor."

In *Coulthart v. Clementson* (g), BOWEN, J., implies that constructive notice of the death would prevent the bank claiming further advances against the estate of the deceased. In *Re Silvester, Midland Railway Co. v. Silvester* (h), ROMER, J., dissented from this view, but did not touch the question of the effect of the death. JOYCE, J., in *Re Crace, Balfour v. Crace* (j), agreed with Romer, J.

It seems admitted that the usual provision for notice of determination by the guarantor applies only to his life, and

(c) *Beckett v. Addyman* (1882), 9 Q.B.D. 783 ; 26 Digest 208, 1633.

(d) [1918] A.C. 903 ; 26 Digest 205, 1608.

(e) (1862), 1 H. & C. 249 ; 26 Digest 208, 1625.

(f) (1873), 8 Ch. App. 866, at p. 869 ; 26 Digest 208, 1626.

(g) (1879), 5 Q.B.D. 42 ; 26 Digest 208, 1627.

(h) [1895] 1 Ch. 573 ; 26 Digest 205, 1607.

(j) [1902] 1 Ch., at p. 739 ; 26 Digest 208, 1630.

that the legal representatives after his death can always determine as to future advances by reasonable notice. It is, in the present state of the question, essential that the provision for notice of determination should stipulate for formal notice, not only by the guarantor, if given in his lifetime, but also by his legal representatives, under the name of executors or administrators, in case of his death without having given notice. This would exclude any question as to constructive notice, or acting on the footing of the guarantee being determined (*k*). Insanity of the guarantor determines his liability for future advances (*l*).

Release of a surety

The danger of releasing a surety by dealings with the principal debtor or a co-surety must always be borne in mind in framing a guarantee, and provided against so far as is deemed necessary (*m*).

By release of principal

The release of the principal discharges the sureties in any case, because the debt is extinguished (*n*). And where the release is absolute, no contract between the debtor and the creditor purporting to reserve remedies against the sureties can have any effect. On the other hand, a covenant or agreement entered into between the creditor and the debtor not to sue the latter, with a reservation of rights against the sureties, will not release the latter (*o*). And even though the document purport to be a release, but it appears therefrom, as by reservation of the right against sureties, that the real intention of the parties was merely an agreement not to sue the debtor, it will be interpreted as such agreement, and the sureties will not be released (*p*).

The novation of a debt by accepting a new debtor in place of the old is a complete release of the latter, which releases the sureties and precludes any such interpretation as the above (*q*).

It would be impossible to hold a surety liable for a debt from a person he had never undertaken to guarantee. If the obligation is to be so shifted, a new guarantee must be taken for the existing debt, and the consideration expressed therein.

(*k*) See *Re Silvester, Midland Railway Co. v. Silvester*, [1895] 1 Ch. 573; 26 Digest 205, 1607.

(*l*) *Bradford Old Bank, Ltd. v. Sutcliffe*, [1918] 2 K.B. 833, at the trial, not mentioned in Court of Appeal; 26 Digest 209, 1643.

(*m*) See *Barclays Bank, Ltd. v. Trevanion, supra*, p. 418.

(*n*) *Commercial Bank of Tasmania v. Jones*, [1893] A.C., at p. 316; 26 Digest 35, 219.

(*o*) *Price v. Barker* (1855), 4 E. & B. 760; 26 Digest 195, 1525.

(*p*) *Green v. Wynn* (1869), 4 Ch. App. 204, 206; 26 Digest 131, 952; *Re Whitehouse, Whitehouse v. Edwards* (1887), 37 Ch. D., at p. 694; 26 Digest 196, 1529; *Duck v. Mayeu*, [1892] 2 Q.B., at p. 514; 12 Digest 510, 4206.

(*q*) *Commercial Bank of Tasmania v. Jones*, [1893] A.C. 313; 26 Digest 35, 219.

“There can be no doubt that a novation by which the original debtor is released from his debt discharges the surety.” (r)

But even such release of the principal debtor may not release the surety if the guarantee be so worded as to cover this contingency. It was so held in *Perry v. National Provincial Bank of England (s)*, where the guarantee provided that the bank should be at liberty to give time for payment, accept compositions and make arrangements with debtors.

Where liability joint and several

Where the liability of the sureties is joint and several, the release of one surety releases the others, ‘the joint suretyship of the others being part of the consideration of the contract of each’ (t), even though a joint and several judgment has previously been recovered against them (u). It may be mentioned that ROMER, L.J., in this case contented himself with an expression of doubt. But for the opinion of the other members of the Court, COLLINS and RIGBY, L.JJ., he would have considered that the instrument by which one guarantor was discharged did not amount “to a discharge of the debt itself, but only as a discharge of the particular debtor from the liability as against himself personally: in other words, as an agreement by the bank not to sue him”.

Where several only

But where the liability of the co-sureties is several only, not joint and several, the release of one does not discharge the other, unless that other had a right to contribution in equity, and that right is taken away or injuriously affected by the release of the co-surety (w). Theoretically a several surety has the same right of contribution as a joint surety (y) but, if alleging release, the burden is on him to show not only the right but the loss of or injury to it.

It is not very obvious why a bank should desire expressly to release one of a number of co-guarantors, but there is no harm in providing for it in a guarantee.

By giving time to the principal

Giving time to the principal debtor releases the surety if the time is given by a binding agreement arrived at for

(r) PICKFORD, L.J., in *Bradford Old Bank, Ltd. v. Sutcliffe*, [1918] 2 K.B. 833; 26 Digest 68, 483.

(s) [1910] 1 Ch. 464; 26 Digest 198, 1549.

(t) *Ward v. National Bank of New Zealand* (1883), 8 App. Cas., at p. 764; 26 Digest 203, 1582; *Re E.W.A.*, [1901] 2 K.B. 642; 26 Digest 202, 1578.

(u) *Re E.W.A.*, *ubi supra*.

(w) *Ward v. National Bank of New Zealand* (1883), 8 App. Cas., at pp. 765, 766; 26 Digest 203, 1582.

(y) *Ward v. National Bank of New Zealand* (1883), 8 App. Cas., at p. 765; 26 Digest 203, 1582; *Whiting v. Burke* (1871), 6 Ch. App. 342; 26 Digest 142, 1053.

good consideration, and the rights against the surety are not reserved (z). The agreement to give time need not be in writing to be binding; it may even be implied. It usually arises where the principal is pressed for further security, the giving of which constitutes consideration for the giving of time (a).

Taking bill from principal

So also the taking a bill from the principal debtor would constitute a giving of time, unless possibly it were clearly shown that it was taken merely as collateral security, not suspending any remedy on the debt (b). Time given to the principal debtor does not discharge the surety if given after judgment recovered against both principal debtor and surety (c).

Question as to surety not being injured

There is some authority for holding that the surety will not be discharged if his remedies are not diminished or affected. But, in view of the judgment in *Ward v. National Bank of New Zealand* (d), it would be most dangerous to rely on this. The Judicial Committee there say, at p. 763 :

"In pursuance of this principle, it has been held that a surety is discharged by giving time to the principal, even though the surety may not be injured and may even be benefited thereby."

The surety is the only judge whether a variation of the contract without his consent is for his benefit or detriment, except possibly in absolutely self-evident cases, as, for instance, the creditor agreeing to take a cheque for £500 in full discharge of a debt of £1,000 (e).

Against reliance on reservation of rights, there is the opinion of LORD ELDON, who held in *Boulbee v. Stubbs* (f), that a reservation of rights against the surety is of no avail, if the contract for reserve prevents the surety's remedy against the principal.

Reserving right to give time

In order to avoid any such questions, the guarantee should, in the plainest terms, secure to the creditor the right to give time to the principal debtor in any way he may deem advisable (g).

(z) *Per* LORD HERSCHELL, in *Rouse v. Bradford Banking Co.*, [1894] A.C., pp. 590, 594; 26 Digest 174, 1310.

(a) See *Overend, Gurney & Co. (Liquidators) v. Oriental Financial Corporation (Liquidators)* (1874), L.R. 7 H.L., at p. 361; 26 Digest 177, 1341.

(b) See *Croydon Gas Co. v. Dickinson* (1876), 2 C.P.D. 46; 26 Digest 158, 1200.

(c) *Re A Debtor* (No. 14 of 1913), [1913] 3 K.B. 11; 26 Digest 183, 1408.

(d) (1883), 8 App. Cas. 755; 26 Digest 203, 1582.

(e) *Cf. Polak v. Everett* (1876), 1 Q.B.D. 669; 26 Digest 162, 1222.

(f) (1811), 18 Ves., at p. 26; 26 Digest 178, 1346.

(g) *Cf. Union Bank of Manchester, Ltd. v. Beech* (1865), 3 H. & C. 672; 26 Digest 197, 1547.

Taking other securities

Save as touching the question of giving time, the risk of releasing a surety by taking securities for the debt affects cases where the suretyship takes the form of a note executed by principal and sureties rather than those where a regular guarantee is given. In so far as the doctrine is based on merger, it is not easy to see what can merge the guarantee, unless it were another one by the same parties under seal. But it might be contended that other securities, though taken primarily for the debt, were in substitution for the security afforded by the guarantee, or, by merging or suspending the debt, affected the liability of the surety.

Power to vary and release securities

There should therefore be a clause that the guarantee is to be in addition to, and without prejudice to, any securities of any kind then or thereafter held or to be held by the creditor for past or future advances ; and full power should be reserved to take, vary, exchange, or release such securities, renew bills, and so forth, without prejudice to the guarantee.

It has been held that the taking of additional security does not, unless it involves the giving of time, of itself discharge the surety (*h*), but in view of what has been said above as to the inference of giving time where security is taken, any question on this point should be anticipated by the guarantee.

Creditor not bound to resort to securities before suing surety

It has been deduced from the case of *Duncan, Fox & Co. v. North and South Wales Bank* (*j*), that where a creditor holds securities deposited by the principal for his debt he is bound to resort to them first, before he can have recourse against the surety (*k*). It is true that in that case LORD WATSON says, at p. 22, that, seeing the real conflict of interest was between the acceptor and the indorsers, he thought it would be inequitable to compel payment from the indorsers (who stood in the place of sureties) until the securities given by the acceptor (treating him as principal) to the bank had been exhausted ; and he further says that he is satisfied that it is a settled rule of equity that, in circumstances analogous to those of that case, the creditor is bound to take payment from that one of his debtors who is *inter eos* primarily liable for his debt.

Exceptional nature of this case

But in that case the facts were peculiar. The bank had discounted bills for and indorsed by Duncan, Fox & Co.

(*h*) *Overend, Gurney & Co. (Liquidators) v. Oriental Financial Corporation (Liquidators)* (1874), L.R. 7 H.L., at p. 361 ; 26 Digest 177, 1341.

(*j*) (1880), 6 App. Cas. 1 ; 26 Digest 115, 816.

(*k*) *Walker's Banking Law*, 2nd ed., 1885, p. 244

accepted by Radford & Co. Before the bills became due Radford & Co. stopped payment. The bills were dishonoured, and Duncan, Fox & Co. became liable to the bank. The bank held securities from Radford & Co. to cover advances and other liabilities, but this was unknown to the indorsers. There was nothing due from Radfords to the bank except the liabilities on these bills. Duncan, Fox & Co. having got to know of these securities, applied to the bank either to realise them and apply the proceeds in payment of the amounts due on the bills, or to render an account of what was due from Radford & Co., and on payment of that amount by Duncan, Fox & Co. to transfer to them securities of equal value out of those in their hands. The securities being also claimed on behalf of Radfords' unsecured creditors, the bank declined to do anything without the direction of the Court, assuming a perfectly neutral attitude, and offering to do whatever the Court ordered (*l*). There were respondents other than the bank, namely, Radfords, and representatives of the unsecured creditors.

The order originally made, which was ultimately restored by the House of Lords, was that the bank should hand over the securities to Duncan, Fox & Co. on payment by them of the balance remaining due to the bank (*m*). The real question was whether Duncan, Fox & Co., as indorsers, were entitled to the same rights as sureties on paying the bills; and, save for the words of LORD WATSON quoted above, there is nothing in the judgments to support the proposition that a surety can decline to pay till the creditor has exhausted securities placed in his hands by the principal debtor.

Contrary expressions in same case

On the contrary, the right to sue the guarantor without resorting to the securities is clearly recognised by LORD SELBORNE, *ubi supra*, at pp. 10, 14, and by LORD BLACKBURN at pp. 18, 20 (*n*). In the Scottish case of *Ewart v. Latta* (*o*) LORD WESTBURY, C., says :

"Until the debtor has discharged himself of his liability, until he has fulfilled his own contract, he has no right to dictate any terms, to prescribe any duty, or to make any demand on his creditor. The creditor must be left in possession of the whole of the remedies which the original contract gave him, and he must be left unfettered and at liberty to exhaust those remedies, and he cannot be required to put any limitation upon the course of legal action given him by his contract by any person who is still his debtor, except upon the terms of that debt being completely satisfied."

(*l*) (1880), 6 App. Cas., pp. 8, 10.

(*m*) See (1879), 11 Ch. D., at p. 91.

(*n*) See also *Re Howe, Ex parte Brett* (1871), 6 Ch. App., at p. 841; 26 Digest 113, 794, where MELLISH, L.J., lays down the broad rule that a surety has no right or interest in securities until he has paid the debt.

(*o*) (1865), 4 Macq., at p. 987; 26 Digest 108, 748.

At p. 989 (new ed., p. 830) he says :

"The same principle prevails also in the law of England, that if a debt be due from A. and B., and B. be the surety, B. has no right in respect of that debt as against the creditor unless he undertakes to pay and actually does discharge it."

It may therefore fairly be assumed that LORD WATSON'S remarks above quoted were intended to be, or must be, confined to cases where no claim or objection is raised by the holder of the securities ; and that no general proposition is to be deduced from them.

There appears, therefore, no absolute necessity for the creditor to secure by the guarantee the right to resort to the surety without first realising securities held from the principal.

Surety's right of set-off

The surety is entitled to a set-off of debts due from the creditor to the principal debtor arising out of the transaction on which his own liability is founded (*p*).

This principle is not likely to operate in the case of a guarantee to a bank. There would be no credit balance on the guaranteed account, and credits on another account are outside the question (*q*).

Right to close account on determination

The right to close the account on the determination of the guarantee and open a fresh one, to which moneys paid in by the customer, and not otherwise allocated by him, can be carried, instead of being applied in reduction of the guaranteed account, is established by *Re Sherry, London and County Banking Co. v. Terry* (*r*), and recognised in *Deeley v. Lloyds Bank, Ltd.* (*s*), but the right is usually reserved in the guarantee.

Provision for change in parties

Where the account or transactions guaranteed is or are those of a partnership, the guarantee should provide that it shall not be effected by any change in the constitution of that partnership. This is the more necessary because under the Partnership Act, 1890, s. 18 (*t*), any change in the constitution of the firm for or to which the guarantee is given revokes the guarantee as to future advances 'in the absence of agreement to the contrary', and the same Act repeals s. 4 of the Mercantile Law Amendment Act, 1856, which admitted 'necessary implication from the nature of the firm or otherwise'.

In the case of a guarantee given to a private bank, provision

(*p*) *Bechervaise v. Lewis* (1872), L.R. 7 C.P. 372 ; 26 Digest 127, 901.

(*q*) *York City and County Banking Co. v. Bainbridge* (1880), 43 L.T. 732 ; 26 Digest 155, 1166.

(*r*) (1884), 25 Ch. D. 692 ; 26 Digest 91, 633.

(*s*) [1912] A.C. 756 ; 12 Digest 488, 3996.

(*t*) 12 Halsbury's Statutes 536.

must be made for the contingency of any change in the constitution of the bank partnership.

Where bank is a corporation

Where the bank is a joint stock one or otherwise incorporated, the matter is different. The Partnership Act, 1890, only deals specifically with 'firms', without defining them. From the nature of the Act the term must, however, be taken as equivalent to 'partnerships'. But the principle involved is a general one; that change in the identity of the person to or for whom the guarantee is given revokes it as to future advances.

A bank, joint stock, or otherwise incorporated, is not a firm; it is a corporation, a legal entity, apart from the members composing it. Any internal changes produced by transfer of shares, election of directors, and so on, do not work any change in the corporation. So far there could be nothing to affect the liability of the surety. And, as before suggested with reference to securities for advances, the opening of new branches is no change in constitution. The corporation remains the same. Branches and the head office constitute but one undertaking (u).

Absorption

The absorption of another bank, a small into a large concern, whereby the identity of the small one is obliterated, would, as regards guarantees given to the absorbing bank, stand on the same footing as the opening of a new branch (w).

With regard to guarantees held by the absorbed bank, these, so far as a definite amount is due at the time of absorption, can be made available in the hands of the absorbing bank. In *Bradford Old Bank, Ltd. v. Sutcliffe* (y): a guarantee was held by Bank A, which was absorbed by Bank B. In a sense the account was continued with Bank B, but it was a dormant loan account throughout. No notice of any change was given to the surety. He contended that he had been discharged by novation, the debtor having accepted Bank B as his creditor.

The Court of Appeal held there had been no novation, and the surety was not discharged. PICKFORD, L.J., said:

"There can be no doubt that a novation by which the original debtor is released from his debt discharges the surety, but a transfer of an existing and ascertained debt to another creditor stands on a different footing. In order to discharge the surety it must affect a material alteration in his position. . . . In either case the transferee of the debt, whether by novation or assignment, is the person with whom

(u) *Prince v. Oriental Bank Corporation* (1878), 3 App. Cas. 325; 3 Digest 173, 301.

(w) *Capital and Counties Bank v. Bank of England* (1889), 61 L.T. 516; 3 Digest 132, 74; *Prescott, Dimsdale, Cave, Tugwell & Co., Ltd. v. Bank of England*, [1894] 1 Q.B. 351; 3 Digest 132, 75.

(y) [1918] 2 K.B. 833; 26 Digest 68, 483.

the surety has to deal, and as the liability is already ascertained, it is a matter of no consequence to whom he has to pay it."

The Court further held that it made no difference whether notice were given to the surety, and that there was no novation because novation required the assent of the old bank, the new bank, and the surety; and that in the absence of such assent there was no evidence that the rights of the old bank were to cease.

BANKES, L.J., said that a creditor may assign his debt or his securities without releasing the surety.

The assignment to the absorbing bank of the outstanding debt by the absorbed one would naturally be provided for and effected by the negotiations and settlement between the two.

This judgment is carefully limited to existing and ascertained debts. There can be neither assignment nor novation of non-existent or possible future debts. The principle is therefore inapplicable to subsequent advances by the absorbing bank. It could not, in ordinary circumstances, be argued that the surety had guaranteed advances from Bank B when it was Bank A he had agreed with, and he knew nothing of the change (z). If there is nothing else to rely on, and unless the account be ruled off and a new one opened, the surety might fairly contend that moneys paid in and not otherwise allocated by the principal should be attributed to the guaranteed debt, leaving subsequent advances uncovered.

Amalgamation

Amalgamation, as distinct from absorption, stands on a different footing.

"An amalgamation between two banks need not necessarily cause the business thereafter carried on to be the same as was theretofore carried on by either; it must depend upon the nature and character of the businesses amalgamated and how the amalgamated business was subsequently carried on. In each case it must be a question of fact." (a)

It must be remembered that, with regard to guarantees, it is not so much the identity of the business that is the test, as the identity of the persons or the legal entity carrying it on. If on amalgamation the names of both banks are combined and preserved, and the board of directors comprises former directors of each of the original banks, the identity of the one to which the guarantee was given becomes difficult to trace.

LORD LINDLEY appears to be of opinion that, in the absence of special provisions, amalgamation of two companies would release sureties on guarantees to either separately (b).

(z) Cf. *per* LORD ELDON, in *Ex parte Kensington* (1813), 2 Ves. & B., at p. 83; 35 Digest 260, 189.

(a) *Per* A. L. SMITH, L.J., in *Prescott, Dimsdale, Cave, Tugwell & Co., Ltd. v. Bank of England*, [1894] 1 Q.B., at p. 365; 3 Digest 132, 75.

(b) See *Lindley's Partnership*, 9th ed., p. 171; *Lindley's Company Law*, 6th ed., p. 369, note (g).

There are two cases where a bond given by way of guarantee to a railway company was held not to be discharged, as to the future, by the amalgamation of the company with another, only on the ground that the Act of Parliament effecting such amalgamation contained special clauses preserving such rights (c). The security in both cases was for the faithful service of an employee, but the principle is equally applicable to a guarantee for advances.

As to guarantees to either of the amalgamated banks, these would apparently stand good in the hands of the combination for ascertained and existing debts due at the time of the amalgamation and assigned by either to the joint body, on the principle of *Bradford Old Bank, Ltd. v. Sutcliffe*. *Dicia*, such as those in *Buckley on Companies* (d), and *Royal Bank of Scotland v. Christie* (e), as to implied novation on amalgamation, must be confined to such existing ascertained debts. As before stated, there can be neither novation nor assignment of what is not in existence. Advances subsequent to the amalgamation would not, in the absence of special terms, come within guarantees to either of the amalgamated banks, and the danger of the existing debt being wiped out by later payments in, unless the account be ruled off and a new one opened, would be at least as present as in the case where the guaranteed bank is absorbed by another.

With regard therefore to new advances by either an absorbing or amalgamated bank, it would be dangerous to rely on guarantees given to the absorbed or either of the amalgamating ones, at any rate unless such guarantees expressly and fully contemplated and provided for such contingency and supplied a clear ground of action to the new creditor.

Provision for, in guarantee

The usual provision in this connection is that which extends the liability to all advances past and future from the bank, notwithstanding its absorption by or amalgamation with any other bank or banks and to all advances from such absorbing or amalgamated banks in like manner, as if such absorbing or amalgamated bank were the original one to which the guarantee was given.

The only difficulty which occurs to one is that a guarantee can only be a contract with the person with whom it is made. Debts can be assigned, choses in action can be assigned, but, save in cases where the personality of the parties is wholly immaterial, neither the benefit nor the obligation of a contract can be handed over to someone else, without the assent of

(c) *London, Brighton, and South Coast Railway Co. v. Goodwin* (1849), 3 Exch. 320; 10 Digest 1154, 8173; *Eastern Union Railway Co. v. Cochrane* (1853), 9 Exch. 197; 26 Digest 173, 1303.

(d) 8th ed., 423 (see ref. in 11th ed. at p. 531).

(e) (1841), 8 Cl. & Fin. 214; 26 Digest 207, 1620.

the other party. Assignability of contracts has been carried far (*f*). Whether it goes far enough to cover the substitution of a different creditor for the one to whom the surety undertook to be liable, for a future unascertained debt, seems open to doubt.

LORD LINDLEY, *ubi supra*, appears to be of opinion that this contingency may be provided against in anticipation by fitting terms. If there are any banks still left to be absorbed or amalgamated, an astute draftsman might devise a clause whereby the guaranteed bank was constituted the attorney of the surety to transfer the benefit of the guarantee, as to future advances, to any bank into or with which that other bank might be absorbed or amalgamated.

Possibly, however, the safer plan is to get a new guarantee to the new bank, or an indorsement on the old guarantee, transferring all obligations thereunder to that bank. A verbal agreement would be no good; a guarantee must be in writing and signed, and no oral terms can be engrafted on or added thereto.

As to exceptional cases of amalgamation under control of the Court, see *ante*, p. 409, and the Companies Act, 1929, s. 154 (*g*).

Surety's right to securities on payment

On payment, the surety, if his payment discharges all obligations of the principal to the creditor, is entitled to all securities held by the creditor, in addition to the guarantee, whether they were held at the time the surety became bound or have been subsequently acquired, and whether the surety knew of them or not (*h*).

The banker, if absolutely recouped by the surety, would have no further need of the securities.

Where part of debt paid

But cases may exist where security is held for a debt, for part only of which the surety is liable. On discharging that liability, the surety is entitled to a proportionate part of the security (*j*).

The apportionment of the security might be difficult in some instances. The surety would claim something he could realise in order to reimburse himself, and the security might not be divisible. In *Goodwin v. Gray*, *ubi supra*, the surety appears to have been satisfied with a proportionate share of the dividends on the debtor's shares in the bank represented by

(*f*) Cf. *Tolhurst v. Associated Portland Cement Manufacturers* (1900), [1903] A.C. 414; 12 Digest 588, 4907.

(*g*) 2 Halsbury's Statutes 875.

(*h*) *Duncan, Fox & Co. v. North and South Wales Bank* (1880), 6 App. Cas. 1; 26 Digest 115, 816.

(*j*) *Goodwin v. Gray* (1874), 22 W.R. 312; 26 Digest 117, 828.

the defendant, which constituted the security, but it is conceived that he was also entitled to a share in or at least a charge on the shares themselves (*k*).

If the surety is surety for the whole debt, but his liability is limited, it would appear from *Re Sass, Ex parte National Provincial Bank of England* (*l*), that he has no claim against the securities or any part of them until the whole debt is satisfied in full. As before stated, this is the form of liability which should be exacted from the guarantor wherever possible, as being the more advantageous for the bank.

Clause as to right to securities

The addition of a special clause to the effect that all securities held against the debtor's liability were to stand to secure full payment of the ultimate balance remaining unpaid would remove any doubt in either case (*m*). The clause might well be worked in with the proviso as to the bank being entitled to receive dividends in bankruptcy and other payments without prejudice to the liability of the surety for the ultimate balance, which was found efficacious in *Re Sass, Ex parte National Provincial Bank of England* (*n*). A proviso or clause to that effect should never be omitted.

Other acts or defaults

The acts or defaults which would release the surety, outside those generally provided for in a well-drawn guarantee, are such as a bank can readily avoid, if it bear in mind the salutary rule that there must be no variation of the contract, no dealing with the principal, or a co-surety, or with the securities for the debt, behind the back of the surety, or without his consent, either given by anticipation in the guarantee, or prior to such dealing; and that, save in absolutely self-evident cases, the surety is the only judge whether such dealing or variation is or is not for his benefit (*o*).

Right to call on creditor to sue

The surety who has paid his liability has a theoretical right to call on the creditor to sue the debtor. If the creditor refuse, the surety may, on indemnifying the creditor, sue in his name (*p*). But the surety can just as well himself sue the debtor on the basis of indemnity or money paid for him, so that the other remedy is not usually necessary.

(*k*) Cf. *Coats v. Union Bank of Scotland*, [1928] S.C. 711.

(*l*) [1896] 2 Q.B. 12; 26 Digest 90, 628.

(*m*) Cf. *Waugh v. Wren* (1862), 1 New Rep. 142; 26 Digest 156, 1176.

(*n*) [1896] 2 Q.B. 12; 26 Digest 90, 628.

(*o*) See *Ward v. National Bank of New Zealand* (1883), 8 App. Cas., at pp. 763, 764; 26 Digest 203, 1582.

(*p*) See Mercantile Law Amendment Act, 1856, s. 5; 3 Halsbury's Statutes 585.

No necessity for special appropriation

The existence of a guarantee does not of itself constrain the banker to any particular system of appropriation of payments-in, so long as he deals with the accounts in the ordinary course of business. In the absence of express agreement, a surety has no right to control the right of appropriation possessed by the person making the payments, or, if he make none, that which is in the payee (*q*). Payments-in may be appropriated to a pre-existing debt of which the surety has no knowledge (*r*), or to a new account opened on the close of the guaranteed one (*s*).

Where unbroken account

Where there is a mere unbroken current account, part of which is covered by a guarantee, the other not, as where the guarantee has been determined, there is, in the absence of appropriation, no presumption that moneys paid in are to be allocated to the unsecured rather than the secured portion, or otherwise than in the usual sequence of payments in and out in order of date (*t*).

Where the guarantee is a continuing one to secure an ultimate balance, the question of appropriation does not arise, except in the sense suggested by COTTON, L.J., in *Re Sherry, London and County Banking Co. v. Terry* (*u*), namely, that credits could not be carried to a new account during the currency of the guarantee so as to deprive the surety of the benefit of them in estimating the ultimate balance for which he was liable (*w*).

The remedies of the surety who has to pay against the principal debtor or the co-sureties do not concern the banker.

Effect of Limitation Act on continuing guarantee

Questions have arisen as to the effect of the Limitation Act on a continuing guarantee.

In *Hartland v. Jukes* (*y*), it was contended that the six years began to run in favour of the guarantor as soon as the principal debtor became indebted to the bank, inasmuch as there was then a right of action against the guarantor; but POLLOCK, C.B., said:

(*q*) *Williams v. Rawlinson* (1825), 3 Bing. 71; 26 Digest 94, 657; *Re Sherry, London and County Banking Co. v. Terry* (1884), 25 Ch. D. 692; 26 Digest 91, 633.

(*r*) *Williams v. Rawlinson*, *ubi supra*.

(*s*) *Re Sherry, London and County Banking Co. v. Terry*, *ubi supra*, recognised in *Deeley v. Lloyds Bank, Ltd.*, [1912] A.C. 756; 12 Digest 488, 3996.

(*t*) *Deeley v. Lloyds Bank, Ltd.*, *ubi supra*.

(*u*) (1884), 25 Ch. D., at p. 706; 26 Digest 91, 633.

(*w*) Cf. *Mutton v. Peat*, [1900] 2 Ch. 79; 3 Digest 272, 848; *Bradford Old Bank, Ltd. v. Sutcliffe*, [1918] 2 K.B. 833; 26 Digest 68, 483.

(*y*) (1863), 1 H. & C. 667; 26 Digest 105, 726.

"It was contended before us that the statute began to run from the 31st of December, 1855, by reason of the debt of £179 : 1 : 11 then due to the bank ; but no balance was then struck, and certainly no claim was made by the bank upon the defendant's testator (the guarantor) in respect of that debt ; and we think, the mere existence of the debt, unaccompanied by any claim from the bank, would not have the effect of making the statute run from that date."

On the other hand, in *Parr's Banking Co., Ltd. v. Yates* (z), the Court of Appeal appear to have taken the opposite view. It is true that in that case the account, so far as drawing on it went, had been practically closed more than six years prior to the commencement of the action, but the Court treated the statute as commencing to run in respect of each item on the debit side from the date it came into the account. VAUGHAN WILLIAMS, L.J., in especial, said that the right of action on each item of the account arose as soon as that item became due and was not paid, and the statute ran from that date in each case, in favour of both principal and surety.

Hartland v. Jukes is cited with approval in *Bradford Old Bank, Ltd. v. Sutcliffe* (a). *Parr's Banking Co., Ltd. v. Yates* was quoted by SWINFEN EADY, J., in *Ascherson v. Tredegar Dry Dock and Wharf Co., Ltd.* (b).

There can be little doubt but that *Hartland v. Jukes* is the better authority.

The view taken in *Parr's Banking Co., Ltd. v. Yates* is altogether inconsistent with the intention and effect of a continuing guarantee. The object of such guarantee is the extension of a real working credit to the principal debtor. There could be no right of action against the guarantor unless there was also one against the principal debtor, and the guarantee would be meaningless if the creditor could demand and enforce repayment of every overdraft within twenty-four hours or less from the time it was granted.

LORD HERSCHELL said in *Rouse v. Bradford Banking Co.* (c) :

"It is obvious that neither party would have it in contemplation that when the bank had granted an overdraft it would immediately, without notice, proceed to sue for the money ; and the truth is that, whether there were any legal obligation to abstain from so doing or not, it is obvious that, having regard to the course of business, if a bank which had agreed to give an overdraft were to act in such a fashion, the results to its business would be of the most serious nature." (d)

There is, no doubt, the difficulty of saying, in the absence of express stipulation, how long the advance is to be outstanding before it is deemed to be repayable ; and it must be

(z) [1898] 2 Q.B. 460 ; 26 Digest 86, 608.

(a) [1918] 2 K.B., at p. 839 ; 26 Digest 68, 483.

(b) [1909] 2 Ch. 401, at p. 406 ; 26 Digest 127, 902.

(c) [1894] A.C., at p. 596 ; 26 Digest 174, 1310.

(d) Cf. *Re Clough, Bradford Commercial Banking Co. v. Cure* (1885), 31 Ch. D., at p. 326, per NORTH, J. ; 36 Digest 396, 679.

admitted that the measure above suggested, namely, a practical working credit, is vague and unsuited for general application. But the alternative view is open to equal, if not greater, objections. There is another consideration which makes the question one of little practical importance.

In *Bradford Old Bank, Ltd. v. Sutcliffe*, *ubi supra*, it was pointed out that the contract of the surety was a collateral, not a direct, one, and that in such case demand was necessary to complete a cause of action and set the statute running. Moreover, guarantees invariably specify the liability of the surety as to pay on demand or when demanded, and in this connection the words are not devoid of meaning or effect, even with reference to this statute, as is the case with a promissory note payable on demand, but make the demand a condition precedent to suing the surety, so that the statute does not begin to run till such demand has been made and not complied with. This in no wise runs counter to the decision in *Joachimson v. Swiss Bank Corporation* (e); indeed the principle is fully recognised there.

Payment of interest or on account of principal by the debtor does not keep alive the liability of the surety, not being made on his behalf (f).

(e) [1921] 3 K.B. 110; 21 Digest 639, 2188.

(f) See *Bradford Old Bank, Ltd. v. Sutcliffe*, *ubi supra*.

CHAPTER 22

BANKERS' BOOKS EVIDENCE ACT, 1879

The object of the above Act (*a*) is to avoid the inconvenience and dislocation of business formerly entailed on bankers by their being compellable to produce their books in legal proceedings to which they were not personally parties (*b*). The previous practice was specially vexatious, because in theory the books could only be utilised for refreshing the memory of the clerk or officer who made the entries and was summoned as a witness, and the real object of compelling their production was that they were in practice invariably but irregularly put forward and treated as substantive evidence in themselves (*c*).

Subject to the specified conditions, this character of substantive evidence is by the Act extended not only to entries in the books themselves, but to duly authenticated copies.

Procedure

By s. 3 (*d*), in all legal proceedings, including arbitrations (*e*), a copy of any entry in a banker's books, that is to say, the ledgers, day book, cash books, account books, and all other books used in the ordinary business of a bank, is received as *prima facie* evidence, not only of the existence of such entry but also of the matters, transactions, and accounts therein recorded. Such evidence is available against anyone; thus copies of entries in the books of defendant bankers can be used as evidence against the plaintiff (*f*).

To be a book used in the ordinary business of the bank it need not be in use every day; it is sufficient if it be a book kept by the banker for reference if necessary (*g*). To secure the immunity and make the copies admissible in evidence, it must be first proved by a partner or officer of the bank, either orally or by production of an affidavit made by him, that the book from which the entries were copied was at the time of making such entries one of the ordinary books of the bank, as above defined, that the entry was made in the usual and

(*a*) 42 & 43 Vict. c. 11; 8 Halsbury's Statutes 236.

(*b*) *Parnell v. Wood*, [1892] P. 137; 3 Digest 309, 1017.

(*c*) See *per* BOWEN, L.J., in *Arnott v. Hayes* (1887), 36 Ch. D., at p. 738; 3 Digest 308, 1016.

(*d*) 8 Halsbury's Statutes 236.

(*e*) S. 10; 8 Halsbury's Statutes 238.

(*f*) *Harding v. Williams* (1880), 14 Ch. D. 197; 3 Digest 307, 1007.

(*g*) *Idiots' Asylum v. Handysides* (1906), 22 T.L.R. 573; 3 Digest 308, 1014.

Act applied to books about thirty years old, and of an absorbed bank.

ordinary course of business, and that the book is in the custody and control of the bank, or the successors of the bank in whose custody or control it was when the entry was made (*h*). It must also be proved in like manner that the copy has been examined with the original and is correct.

Presumably also the banker must have given all reasonable facilities to a party authorised to inspect and take copies of entries by an order under s. 7 of the Act (*j*), since it is only when the banker has complied loyally and fully with the requirements of the Act that he is entitled to its protection (*k*). The privileges of the Act are confined to banks which have made the proper return to the Inland Revenue under s. 21 of the Bank Charter Act, 1844 (*l*), or companies 'carrying on the business of bankers' who have made the return required by s. 108 of the Companies Act, 1929 (*m*), and stated the places where they carry on business, who are then 'deemed to be a bank and bankers within the meaning of the Bankers' Books Evidence Act, 1879' (*n*). In the one case a verified copy of the return, in the other, the registrar's certificate, must be produced (*o*).

It has been suggested that these restrictions exclude the Bank of England from the operation or benefits of the Act.

Where the bank itself is a party to the litigation, it can still be made to produce its books under *subpoena duces tecum*, and, in litigation to which the bank is no party, there is also power for special cause to order the production of bank books, the contents of which could be proved under the Act (*p*). It would seem, however, that short of some recalcitrancy on the part of the banker, no such order should be made (*q*).

Inspection

Any party to litigation who, prior to the Act, could have compelled the banker to produce his books, may, before trial, apply for an order entitling him to inspect and take copies of any entries in such books for the purpose of such litigation (*r*). Under this section an order may be made by a magistrate before whom criminal proceedings are being taken (*s*). The granting or refusing such application is discretionary (*t*) and the power

(*h*) Ss. 4, 5 ; 8 Halsbury's Statutes 236, 237.

(*j*) 8 Halsbury's Statutes 237.

(*k*) *Emmott v. Star Newspaper Co.*, *ubi infra*.

(*l*) 1 Halsbury's Statutes 537.

(*m*) 2 Halsbury's Statutes 841.

(*n*) Companies Act, 1929, s. 361 ; 2 Halsbury's Statutes 1000.

(*o*) Bankers' Books Evidence Act, 1879, s. 9 ; 8 Halsbury's Statutes 238.

(*p*) S. 6 ; 8 Halsbury's Statutes 237.

(*q*) Cf. *Emmott v. Star Newspaper Co.* (1892), 62 L.J.Q.B. 77 ; 3 Digest 308, 1013.

(*r*) S. 7 ; 8 Halsbury's Statutes 237.

(*s*) *R. v. Kinghorn*, [1908] 2 K.B. 949 ; 3 Digest 309, 1021.

(*t*) *Emmott v. Star Newspaper Co.*, *supra*.

to grant it will be exercised with great caution and only on clearly established and sufficient grounds (u) :

"If the Court were satisfied that in truth the account which purported to be that of a third person was the account of the party to the action against whom the order was applied for, or that though not his account, it was one with which he was so much concerned that items in it would be evidence against him at the trial . . . then they might order an inspection."

This test was approved by the Court of Appeal in *Ironmonger & Co. v. Dyne* (w), when inspection of a husband's account was ordered for the purpose of discovery of facts concerning his wife's transactions in securities for which the husband's account was a cloak. If made at all, the order should be strictly confined to relevant entries, of which copies would be admissible in evidence at the trial (v).

Accounts of third parties

The power to make such order is not absolutely confined to the accounts of parties to the litigation, but it will seldom, if ever, be exercised with regard to the accounts of third parties unless it be shown that such account is in substance really the account of one of the parties to the litigation, or kept on his behalf, so that the entries would be admissible in evidence (z). Where it is sought to obtain inspection of the account of a third party, notice of such application must be given to such third party and to the bank.

It would be obviously improper for a banker to give information or other facilities with regard to his customer's account to any party in a litigation except under compulsion of the Court. When, however, an order allowing inspection and copies to be taken has been made and served, there would seem no objection to the bank's supplying the requisite copies, if that be the more convenient course (a). It is very improbable that a banker would ever now be simply served with a *subpoena duces tecum* in proceedings to which he was not a party. If he were, he might disregard it, the only legitimate method of compelling his attendance being the special order under s. 6 (b), unless he be in default under one of the previous sections or s. 7 (c).

(u) see *Arnott v. Hayes* (1887), 36 Ch. D., per BOWEN, L.J., at p. 738; 3 Digest 308, 1016; also *South Staffordshire Tramways Co. v. Ebbsmith*, [1895] 2 Q.B., per LORD ESHER, M.R., at p. 674; 3 Digest 309, 1018.

(w) (1928), 44 T.L.R. 579; Digest Supp.

(v) *Arnott v. Hayes*, *ubi supra*; *Howard v. Beall* (1889), 23 Q.B.D. 1; 3 Digest 308, 1011; *Peery v. Phosphor Bronze Co., Ltd.* (1894), 71 L.T. 854; 3 Digest 309, 1019.

(z) *South Staffordshire Tramways Co. v. Ebbsmith*, *ubi supra*; *Howard v. Beall*, *ubi supra*; *Pollock v. Garle*, [1 98] 1 Ch. 1; 3 Digest 308, 1012; *Ironmonger & Co. v. Dyne*, *supra*.

(a) Cf. *Emmott v. Star Newspaper Co.*, *ubi supra*.

(b) 8 Halsbury's Statutes 237.

(c) 8 Halsbury's Statutes 237; cf. *Emmott v. Star Newspaper Co.*, *ubi supra*.

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